PROHIBITION OF MANDATORY RETIREMENT AND EMPLOYMENT RIGHTS ACT OF 1982

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2617

TO AMEND THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 TO ELIMINATE MANDATORY RETIREMENT AND OTHER FORMS OF AGE DISCRIMINATION IN EMPLOYMENT

AUGUST 18, 1982

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PROHIBITION OF MANDATORY RETIREMENT AND EMPLOYMENT RIGHTS ACT OF 1982

WEDNESDAY, AUGUST 18, 1982

U.S. Senate,
Subcommittee on Labor
of the Committee on Labor and Human Resources,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles, Randolph, Kennedy, Hawkins, and Quayle.

Opening Statement of Senator Nickles

Senator Nickles. Good morning.

We welcome Senator Kennedy, Senator Randolph, and Senator Hawkins. Senator Hatch is detained at the moment. He hopefully will be joining us shortly.

Today's hearing concerns proposed amendments to the Age Discrimination in Employment Act. The act was last amended in 1978. Since that time, there has been a great deal of discussion and legislative activity surrounding it. The most recent effort to amend the act is directed toward removing the age 70 cap from the Age Discrimination in Employment Act. Supporters of that legislation, Senate bill 2617, say their amendment would not only benefit older Americans, but also would have little impact on others.

Opponents of the measure have expressed concern that lifting the cap alone would create some serious problems. Issues such as pension accrual of interest to the aging community, procedural issues under the Age Discrimination in Employment Act—a concern of the business community—and the reinstatement of the tenured faculty exemption, which expired July 1 of this year and which is a concern of the education community, all have been brought to this subcommittee's attention.

To underscore some of these concerns, Senator Quayle introduced Senate bill 2844 this Monday. His bill recognizes the diversity of issues surrounding the Age Discrimination in Employment Act and addresses many of those.

There are many people and interests on each side of this legislation. Yet, the hearing record on the Age Discrimination Act which has been produced thus far has not been broad enough or detailed enough to reach a conclusion on many of the issues previously noted.

Today's hearing will build a better balanced and more complete hearing record on this issue. It is our hope that in providing all sides of the issue an opportunity to present their views, such a record can and will be made.

We are very pleased to have Senator Heinz with us this morning. We are very proud that Senator Kennedy and Senator Randolph are here. Senator Kennedy, did you have an opening statement?

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Yes, I do, Mr. Chairman. I want to express my appreciation to you, Mr. Chairman, for holding these hearings this morning, and I welcome the opportunity to make a brief statement about this particular issue.

As a sponsor of the Age Discrimination in Employment Act of 1967, as well as the 1978 amendments to that act, I am proud of the significant progress that we have made in eliminating arbitrary and invidious discrimination against older workers in our society. S. 2617 is a small but important step toward ending the vestiges of discrimination against older Americans.

I favored eliminating mandatory retirement in 1978. However, at that time, concerns were raised about the impact which removal of the age cap would have on the employment opportunities of younger workers. We therefore compromised and raised the age cap from 65 to 70, and directed the Labor Department to conduct a detailed study of the effects of this change on the employment opportunities of younger workers.

That report has now been completed and it is now clear that the concerns raised in 1978 were unfounded and that there is no longer any justification for maintaining the age cap at 70.

There are other changes in the law which I favor. I am particularly concerned about the exemption in current law which permits employers to force certain executive and policymaking officials to retire at age 65, as well as the provision which permits employers to cease making pension contributions for those who continue to work past age 65.

So, S. 2617 does not address those issues, because we wanted to eliminate the upper age limit under the ADEA quickly and without lengthy debate. By the same token, Mr. Chairman, I am concerned about the efforts that may be made on the legislation to alter and change the procedural protections for our senior citizens. And I want to make very clear that should those particular changes alter and change this legislation, then I would have to resist the passage of the legislation.

I know that the witnesses for a number of the organizations—business organizations and others—appearing before us today will recommend that no action be taken on S. 2617 unless we modify or eliminate the jury trial and liquidated damage provisions of the ADEA. As a sponsor of the jury trial amendment in 1978, I can assure you that I will do everything in my power to prevent any weakening of this basic procedural right.

At a time when budget cuts and a lack of commitment to vigorous enforcement by the administration have drastically reduced the effectiveness of laws covering race and sex discrimination, the

ADEA continues to be an extremely effective tool for protecting the rights of older Americans. One of the principal reasons is the jury trial provision, which has proven to be an important incentive for voluntary compliance. Without this protection, plaintiffs in age discrimination cases would be severely disadvantaged and the enforcement mechanism of the act would be severely undermined.

I want to thank Senator Nickles for scheduling this hearing today, and I hope we can work together quickly to enact this bill before the Congress adjourns.

Mr. Chairman, just one additional word. I want to extend a very warm welcome to Senator Heinz, with whom I have had the opportunity to work very closely on this particular proposal, and who is really one of the real authorities in the Senate on this whole issue. I welcome both the opportunity to work with him and to hear his testimony, and I think the committee will benefit from his insights on this issue.

Senator NICKLES. Thank you, Senator Kennedy. We appreciate your input.

Senator Hawkins, we welcome you. Do you have an opening statement?

OPENING STATEMENT OF SENATOR HAWKINS

Senator HAWKINS. I want to thank you for scheduling these hearings so promptly on such an important issue. Senator Heinz and Congressman Pepper, who has just entered the room, both have done so much to advocate and protect the rights of the elderly, and I am so pleased that they are willing to testify today.

Congress has long been concerned about the adverse effect that mandatory retirement policies have had on older workers. The Age Discrimination in Employment Act has been amended twice since its enactment in 1967 in order to expand and extend the protections against age discrimination in employment.

In 1978, amendments to the act increased the age at which non-Federal workers could be forcibly retired to 70. I feel this cap was as arbitrary as the previous age limit of 65. But in my opinion, it was never meant to be a permanent cap. The cap was designed to be a temporary measure until the Department of Labor could study the act and determine the potential effect that total elimination of a mandatory retirement age would have on the labor force.

Those studies have been completed, and they show that while the act's effect on the younger work force has marginal, it has had a major beneficial effect on those individuals who desire to continue working. It is now time for Congress to review these studies mandated by the 1978 amendments and actively consider legislation to eliminate mandatory retirement altogether. Thank you.

Senator NICKLES. Thank you, Senator Hawkins.

Senator Randolph, we appreciate your being with us today. Do you have an opening statement?

OPENING STATEMENT OF SENATOR RANDOLPH

Senator RANDOLPH. Thank you very much, Mr. Chairman. At the very outset, I commend our colleague, Senator Heinz, for his leadership in this important legislative effort, and I hope it will be a successful effort. And I commend, of course, all those, including the members of our committee and the Members of the Senate and House, for not putting this subject on the back burner, but hopefully working together so that we can, before the end of this Congress, before we go out in November or October, have this legislation passed, with changes, perhaps, and signed by the President of the United States.

I think we recognize, all of us, that the percentage of older workers and elderly persons is expanding very rapidly in our population. Today, more than 20 percent of the Americans in our country are above the age of 54, and one in nine persons, or 25 million individuals, is 65 or older.

I just turn aside to say that the former Senator Claude Pepper, and the present Representative Claude Pepper, all in one, is here today. And I will be rather, let us say, not in the manner of hearing—but I will look over at him and say that when we talk about these older persons, Claude, you and I are included. We are the only two Members here this morning of the Congress that are over 80 years of age. So, we are delighted that our constituencies never allowed a ceiling on the period when we could serve in this body.

Senator KENNEDY. Hear, hear.

Senator RANDOLPH. Hear, hear. [Laughter.]

Now, I will have the statement in full entered; I want to be cooperative, Mr. Chairman. And I will just say that our population will continue to expand, and the general population at the turn of the century and after the year 2010—dramatic increases are going to occur in this country of men and women over the age of 65.

In fact, 17 percent of West Virginians are 60 years or older. We do not give to Florida and New Mexico and California the right to have all of these fine people. In West Virginia, we know that the 60-plus population is the fastest growing segment of our citizenry.

In addition, one-third of the men and women in West Virginia who are over 60 return to the job market after retirement. There are many reasons individuals go back to work after retirement, including both the economic reason and the self-fulfillment motivation.

We know that the Community Service Employment Program of the Older Americans Act has been of great help to these people.

Now, finally, West Virginians are a healthy, happy people, and perhaps it is because they work harder, they work longer and they survive longer. I think this phenomenon is also associated with the beauty of our landscape—our mountains, rivers and forests. This is not the time to talk about that so much, but to know that we have in West Virginia these men and women, Senator Heinz, in their seventies and in their eighties who are very active in West Virginia. They are not sitting in a rocking chair on a porch. They are men and women who, frankly—one of them, I know, in her nineties is milking a herd of 10 cows.

Now, I could give you many illustrations. I attended the birthday party of a very sweet lady of 100 in the last few weeks. And gifts were there and I noticed a new fishing rod, and I said to her, "Where did this rod come from? You do not fish any more, do you?" She said, "Oh, yes, I fish two or three times a week in both the Potomac and Shenandoah Rivers." She said, "This new rod was given to me by the rural mail carrier."

I am only saying that these men and women do not want to place themselves or be placed on the shelf. So, there is every reason why the so-called mandatory ceiling should be lifted.

I thank you, Mr. Chairman.

[The prepared statement of Senator Randolph follows:]

PREPARED STATEMENT OF SENATOR RANDOLPH

Senator **RANDOLPH**. Mr. Chairman, I appreciate the opportunity to discuss with you and others, legislation to eliminate mandatory retirement at age 70. I am anxious to learn the views of the witnesses and share in their expertise on this subject.

Mr. Chairman, we recognize that the percentage of older workers and elderly persons is expanding in our population. Today, more than 20 percent of Americans are above the age of 54, and 1 in 9, or 25 million persons, are 65 or older. More than 9 million individuals are 75 or older. According to the Bureau of the Census and the Social Security Administration, nationally projected growth patterns indicate that the older population will continue to expand at the same rate as the general population until just after the turn of the century, but after the year 2010, dramatic increases will occur.

Many older persons are productive workers, with a great deal of talent and experience developed over a lifetime of skilled work. In my State of West Virginia, we have a substantial number of older people in the population. In fact, 17 percent of West Virginians are 60 years and older. We know that the 60-plus population is the fastest growing segment of West Virginia citizens. And, most important and perhaps, most frightening, one-third of West Virginians who are over 60 subsist on incomes below the poverty level. In addition, one-third of persons in my State who are over 60 return to the job market after retirement. There are many reasons individuals go back to work after retirement, including both economic and self-fulfillment motivations. We know that the community service employment program, title V of the Older Americans Act, has been of enormous help to the older workers in West Virginia, and I am pleased that the Senate on July 1 acted positively on our resolution to prohibit termination or weakening of this vital program.

In fact, the senior community service employment program in West Virginia provides part-time work for several hundred older workers, many of whom work in the home service field. These homemaker-helpers provide critical assistance to other more elderly persons who are often infirm or need assistance with medication, or with chores or errands. There are also bus drivers, or handymen who work in many jobs under the program. There are so many testimonials to the effectiveness of this program: One woman whose father, now aged 79, has returned to work said to the job developers in the program, "thank you for giving me my father back. He just can't wait to go to work and we have to fuss with him to make him go home at the end of the day. This job means so much to him."

The five individuals who, along with the young director, run the program in Charleston, who actually match job opportunities with older workers range in age from 68 to 76, and while they are supposed to work 20 hours a week, they put in many more hours cheerfully and helpfully, so that other older workers can find jobs.

West Virginians are a hearty people and maybe because they work hard, they survive a long time. I think this phenomenon is also associated with the beauty of our land with its mountains, rivers, forests, and the love of our families, as well as other traditions of the hills. One tradition we hold close to our hearts in West Virginia is we continue to work as long as we are able. We maintain a compassion and more importantly a respect for older workers. We have ladies in their seventies and eighties still making quilts in Cabin Creek, and farmers in their eighties in Raleigh County and other places who still take care of their farm animals and supervise the family farms.

Indeed, a few years ago, one lady in Fairmont, W. Va., was sworn in as a citizen of the United States at the age of 103. These few examples of West Virginians who work hard into their old age are representative of similar individuals all across the Nation. I believe we owe older people the opportunity to contribute in productive ways for as long as they wish and as long as they are able.

We must be concerned with the needs of older workers who are in the labor force today, and the legislation before us addresses this immediate issue. S. 2617, which I am cosponsoring, would lift the cap on mandatory retirement at age 70; it would allow individuals who are over 70, who want to continue working and who are able, to do so.

What can be gained by removing the mandatory retirement provision?

First, removing the age 70 cap will improve equal employment opportunity for older workers and make mandatory retirement based solely on age a discriminatory practice.

Second, dropping mandatory retirement will recognize the different abilities of persons who are over 70, many of whom can perform well and should be allowed to work beyond that arbitrary age limit.

Third, eliminating mandatory retirement will cause an improvement in the cost of Government income programs, such as social security in the future. More people will be working longer and consequently paying into the system longer. They will not be collecting payments as soon, and the costs will not escalate as rapidly.

Fourth, the psychological and emotional hardships, as well as economic hardships, associated with growing older, will be lessened for individuals who want to work and who have the capacity to work beyond age 70. We can continue to benefit from the experience and dedication of older workers who have resources and skills that are so important to our productive capacity. By removing the mandatory retirement age cap, we show our fatih and respect for older workers.

Senator Nickles. Thank you, Senator Randolph. We very much appreciate your input, and also your assistance with us today.

We are pleased to have as our first witness the Senator from the great State of Pennsylvania, Senator Heinz, the author of S. 2617.

Senator Heinz, would you proceed.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Yes, Mr. Chairman, thank you very much. At the outset, let me say that the best endorsement of S. 2617 is, in fact, my good friend, the Senator from West Virginia, and our mutual good friend and very much admired chairman of the Special Committee on Aging in the House, Claude Pepper. I think they are the two most obvious and clearest arguments in favor of ending mandatory retirement.

I want at the outset to thank you, Mr. Chairman, for scheduling this hearing on this and other measures. I think it is an important subject because I think anybody who has studied the subject of mandatory retirement of a person solely on the basis of chronological age has come to the conclusion that such retirement is wasteful, arbitrary, and tragic in its consequences—wasteful because we are sidelining our most experienced players in our work force; arbitrary because, contrary to popular stereotyping, research findings show job performance and productivity to be high among older workers; tragic because of the often devastating impact on the individual of forced separation from his or her livelihood and, often, friends.

There are four principal claims used to justify mandatory retirement. I think each of those claims is invalid. First, it is claimed that mandatory retirement helps open up jobs for younger workers, women and minorities. To the contrary, the Department of Labor study that Senator Kennedy referred to will soon be released to everybody, and that study finds that abolishing mandatory retirement would have no adverse impact on those segments of the labor force that I mentioned. Those groups simply do not compete for the same types of jobs.

The second claim is that mandatory retirement is acceptable to employees and those nearing retirement age. The fact is that the American public views mandatory retirement as simply wrong.

The fact is that a nationwide Harris poll found that by a margin of 9 to 1, Americans of all ages agree that "nobody should be forced to retire because of age." Further, the poll found that three out of four retirees wished that they had never quit work.

Staying on the job may be desirable for many older people because of the psychic rewards work brings. But for the majority, it is even more than just enjoyment and being alive; the decision is often an economic one. Work brings in money to supplement pensions and savings that are increasingly threatened by inflation.

Now, the third claim in favor of mandatory retirement is that it is somehow a simple and inexpensive policy that avoids problems for both the employer and the employee—problems that could result from trying to arrange retirement on the basis of individual performance or competence.

The fact is that mandatory retirement has provided management with a convenient, easy escape from their human resource responsibilities. Health and performance capabilities vary by individual, not by each group. There is no single chronological cutoff point at which a worker can be judged inept.

Forcing productive older workers out of the work force is contrary to our national interests as well. The population of younger working age people—the population aged 16 to 44 years of age—has, as of today, stopped growing, and it will be continue to be stable or declining from now on through the year 2000. What that means is that companies will need older workers as the younger replacement group begins to shrink.

Mr. Chairman, the Special Committee on Aging has been looking at alternatives to mandatory retirement. They do exist. Today, the committee is releasing an information paper which will be made available to all members of your committee and Members of the Congress, which provides practical guidance to employers on the application of age-neutral, functional job criteria.

Discussed in the paper are working examples of companies that use such criteria with great success. We hope that this kind of hard information will dispel the false fears of those who believe that the American business system, which has coped with so much and which has done so much, can somehow not cope with the responsibility of treating older workers rationally and fairly.

Finally, Mr. Chairman, it is claimed that the elimination of mandatory retirement goes against the grain of our free enterprise system because it regulates the retirement policies used by business. I find that argument extremely ironic—ironic in the extreme, since it is our present system that allows Government regulation of something the Founding Fathers placed great value on—individual citizen choice. Our bill would eliminate that regulation and return to business and individual citizens the freedom of choice about when to retire.

Mr. Chairman, I think it is noteworthy that business itself thinks mandatory retirement is bad policy, and is indicating increasing opposition to mandatory retirement. Indeed, in 1981, a nationwide Harris survey of employer attitudes found that 51 percent of employers agreed that "mandatory retirement should be abolished by the end of this decade"—the 1980's.

In summary, Mr. Chairman, mandatory retirement is bad for workers, it is bad for business, and it is bad for the economy. And age discrimination, like discrimination based upon race, religion or sex, is in inherently contrary to the principle of job opportunity based on individual merit. Eliminating this type of discrimination will signal our recognition of the value of older workers in the workplace and will signal our intention to reject all barriers to their full participation.

Mr. Chairman, I thank you and your colleagues for this opportunity to testify.

[The following information was supplied for the record:]

FACTS ABOUT MANDATORY RETIREMENT

Of the over 100 million persons of all ages in the workforce, approximately 28 million are now covered by the provisions of ADEA. To be covered, employees must work in a firm with 20 or more employees.

The DOL estimates that there are 1.8 million persons now working between age 65 and 70 and 1.2 million persons over the age of 70.

Enactment of federal legislation to eliminate the age 70 cap would result in an increase of about 2 percent in the total number of employees covered by the Act.

Over 200,000 additional men and women are expected to continue working by the year 2000 as a result of the prohibition of mandatory retirement.

The DOL study concludes that abolishing mandatory retirement would have no significant negative impact on the employment of minorities, youth or women. These latter groups tend to be involved in different occupations (manufacturing, retail, wolesale while older workers tend to be involved in administrative and service occupations.

According to a Harris survey, 9 out of 10 Americans oppose any form of mandatory retirement based on age.

51 percent of employers in a recent nationwide survey believe mandatory retirement based on age.

Eight States have abolished mandatory retirement for all workers: California, Florida, Iowa, Maine, New Hampshire, Tennessee, Utah, and Vermont.

Senator **Nickles**. Thank you, Senator Heinz. We appreciate your leadership and input. Your bill, as introduced, would take the cap off, period, for everything that is covered under the Age Discrimination Act, which would include hiring, promotions, transfers, and terminations.

We will have the administration testifying that they wish to take the cap off only as it relates to terminations. Would you support such a limited approach?

Senator **Heinz**. Mr. Chairman, I remain committed to the passage of S. 2617. It is my position that age discrimination, whether it is in promotion, whether it is hiring, or whether it is in retirement, is a violation of an individual's civil rights, and it is a principle that should be fully reflected by law.

Now, I do welcome the fact that the administration does support the elimination of mandatory retirement. I think that is a great step forward. I welcome the President's support of that, and I am going to continue to work with the administration to resolve any differences between my legislation and what the administration seems to support.

I certainly do hope that it will be possible to come to an agreement and that it will be possible to enact my legislation or legislation substantially like it in this Congress.

Senator **Nickles**. Senator Kennedy.

Senator **Kennedy**. I would just thank the Senator for an excellent presentation.

Senator **Nickles**. Senator Hawkins.

Senator **Hawkins**. Yes. Senator Heinz, much of the financial difficulties that are facing public and private pension plans have been blamed on the aging population. But from your study and your insight into this problem, does not the decrease in labor force participation of older workers caused by mandatory retirement and early retirement play an equal role in these financing difficulties?

Senator **Heinz**. We have not done an exhaustive study, nor is the information paper that we are releasing today specifically aimed at those kinds of actuarial estimates, Senator Hawkins. But the other inquiries we have made would strongly support the point of view that you have just described; that indeed early retirement and, indeed, the reduction in labor force participation by older workers is a tremendous financial burden on pension funds. And I think the evidence on that that is generally available, as opposed to any specific work done by the Aging Committee, is quite incontrovertible.

Senator HAWKINS. Would not the financing problems be much less severe if the labor force participation of the elderly had not been steadily decreasing?

Senator HEINZ. I think that is entirely correct.

Senator HAWKINS. Does not the mere existence of mandatory retirement encourage workers to retire early?

Senator HEINZ. It not only encourages workers to retire and forces workers to retire--you are absolutely correct in that--but it does one other thing. It sends a message throughout our society to businesses, to workers and to their families, which we often refer to as age stereotyping.

We perpetuate the total myth, as evidenced by my friend from West Virginia or Claude Pepper or hundreds of thousands and, indeed, millions of other Americans in this country whose stories are not as well known as those of the two gentlemen I have just mentioned, that somehow when you hit age 65, which is when you qualify for full social security benefits, or age 70 when you can be forced to retire, somehow you have lost your capability to do a good job; somehow, you are not the human being you were just the day before.

I think that age stereotyping that we have engaged in and in which even some of the elderly have engaged in, although most of them are well aware of what is involved, has been tremendously detrimental to pension systems and generally to the productivity of our country.

Senator HAWKINS. Do you have any estimation of the number of older Americans that would take advantage of elimination of mandatory retirement?

Senator HEINZ. Yes, we do have estimates that if my bill were enacted, the provisions as they relate to the Age Discrimination in Employment Act as regard hiring and promotion would apply to about 200,000 people. Now, that does not mean that only——

Senator HAWKINS. 200,000?

Senator HEINZ. That does not mean that only 200,000 people would work past age 70. That is not at all the case. There is a substantial number of people now working passed age 70. My recollection is close to 2 million senior citizens over age 70 are in the workforce.

But I use the 200,000 number because that is essentially the difference between what the administration appears to favor and what I favor. The administration does not want, as I understand their position, to apply the ADEA provisions against discrimination in hiring or promotion. They are in favor of lifting the mandatory retirement cap.

It is our estimate that what we are talking about there is a maximum of 200,000 people who would be subject, as a result of my legislation as opposed to the administration legislation, to being in any way affected by that difference.

Senator HAWKINS. Thank you so much.

Senator NICKLES. Senator Randolph.

Senator RANDOLPH. You have been speaking about Representative Pepper, and that is as it should be. I shall place in the record a number of Senators and Representatives who, in the 193 years that the Congress has now been constituted and has been meeting, served past the age of 80, for example, and past the age of 70. You will discover that many, many, including women, have been here at what we call the upper brackets of life.

I mentioned the lady who fishes. She just told me a few days ago that she is chairing a committee to raise funds for the new memorial hospital in the county which I have mentioned.

These are just the flavors of this subject matter. They are not talking about the specifics of Senate 2617. How many Senators have joined you in that measure? It is not too important perhaps, but I just wanted to——

Senator HEINZ. We have 27 cosponsors as of today, Senator.

Senator RANDOLPH. Twenty-seven cosponsors. It does show an intense interest in the Senate, and I hope that we can—and expressed that thought earlier, and now I stress the point—what do you feel is the opportunity for passage before we leave this second session of the 97th Congress?

Senator HEINZ. Senator Randolph, I think the opportunities for passage are excellent, if we can come to an agreement among ourselves. I think this is a bill that the administration welcomes. They have called for a very large step forward.

I know Senator Pepper and the people in the House are anxious to move ahead. It is something the American people strongly support. I can see no barriers to our resolving what should prove to be minor differences, and I would hope we could move ahead quite promptly.

Senator RANDOLPH. Thank you.

Senator NICKLES. Thank you.

Senator KENNEDY. Just before the Senator leaves, it was mentioned earlier in the exchange that three out of four retirees wished they had continued their employment. Actually, in the administration legislation, if they came back and asked for their employment back, there is nothing in the administration bill that would protect them from discrimination.

Senator HEINZ. That is correct.

Senator KENNEDY. I think that is obviously a matter of some concern. I thought that was an interesting statistic that was brought out in the earlier exchange.

Senator HEINZ. It would also be true that anybody who retired at age 60, even under current law, would not have much in the way of a right back. So, I am not sure whether that necessarily bears on the application of this legislation.

Senator NICKLES. Senator Heinz, we thank you very much for your input and leadership in this.

Our next guest is Congressman Claude Pepper, who has been a leader in the House. Congressman Pepper, we welcome you.

STATEMENT OF HON. CLAUDE PEPPER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. PEPPER. Mr. Chairman and members of the committee, thank you very much for your kind invitation to be here. I appreciate the opportunity to speak upon this important matter to your distinguished committee.

I am especially pleased to see my fellow young octogenarian over there, Senator Randolph. I want you all to understand that he and I look forward to the enactment of this legislation because we regard it as assurance of protection of our activities after the year 2000, in case a prejudice should develop against those over 100 who continue to work. [Laughter.]

By that time, I am sure the distinguished Senator from Massachusetts will perhaps have had at least a second term. [Laughter.]

Mr. Chairman and members of the committee, if I may say so, when President Carter asked me to make some remarks if I cared to do so when he signed, in the Rose Garden, the 1978 amendments to the Age Discrimination in Employment Act, I said, "Mr. President, today is a day of exhiliration for many millions of our fellow countrymen, for henceforth, by virtue of this legislation, when the Lord blesses them with a 65th birthday, it will not be the death day of their working lives."

What we propose to do in the legislation of which Senator Heinz is the distinguished author and on which you are hearing here today, and the companion bill, H.R. 6576, which has 181 sponsors in addition to myself—when those pieces of legislation are adopted, we will have removed the cap of 70, and I think will be the first nation in the world that will have said we are not going to force any worker into retirement on account of age, no matter how old he or she is.

If I may say so, a lot of my Jewish friends in Miami Beach who are part of my proud constituency often wish me the life of Moses—120 years for my life. There was a rabbi standing there the other evening and he said, "Yes, and with inflation it should be more." [Laughter.]

So, we are not only glad to see people grow older, live longer and have greater happiness in life, but at the same time we also want to assure that they shall have a right to work and shall have a significant feeling that they are a part of the vital stream of life around them, not in an eddy somewhere just waiting to be washed forever aside.

It was just 4 years ago that the legislation to which I referred was adopted. I can tell you now, I think, without any impropriety that there was a delay in the notice that we received from the White House as to whether or not we could have a ceremony in the Rose Garden.

Finally, I made some inquiry and discovered that two Cabinet members had advised President Carter not to sign our antimandatory retirement bill; that it would dislocate the pension system of the country and it would disturb the employment practices of the companies of the Nation, and the like.

Well, I called Mrs. Carter and told her I did not think the President could afford not to be identified with that legislation any more than we could. And so in a little while they called back and said we could have the ceremony in the Rose Garden, but we take only 15 minutes. Of course, once we got there, we went through the proper ceremony.

But that simply showed that even at that time, Cabinet officers were concerned about that antimandatory retirement legislation;

that it would disrupt the whole employment structure of this country.

The Prohibition of Mandatory Retirement and Employment Rights Act of 1982 is unlike most of the legislation in Congress today because it is not designed to meet the needs of a narrow constituency. Age discrimination can touch the lives of every American.

When they complain that maybe we are putting too much emphasis upon the elderly, I say, well, could our appeal be more universal? Everybody is old or expects to get old or hopes to get old someday, so we are talking about the welfare of all the people. It is for this reason that this legislation has the nearly unanimous support of the American people.

The failure to enact this legislation would be not only a disappointment to several millions of older workers affected by it; it would also be an irresponsible abrogation of our duty to serve the people of our country. So, this is a compelling reason to act immediately upon this legislation.

The increase in labor force participation by older American workers brought about by enactment of this bill would come at a time when our Nation begins to face critical labor shortages. We are not going to have massive unemployment always. These labor shortages which will emerge in the next 5 years stem from a dramatic decline in the birth rate and a subsequent reduction in the number of young-aged workers entering the labor force.

Moreover, our Nation's colleges and universities will fall far short in meeting industry's demand for skilled workers, such as engineers and computer technicians. The result of these shortages will be an increased demand for older workers.

Encouraging older persons to remain employed longer by removing age barriers in the work force is critical to our economy, therefore, and important for the future of social security and other retirement income systems.

According to a Data Resources, Inc. study presented to the Select Committee on Aging earlier this year, an increase in labor force rates of older men to 1970 levels would, by the year 2005, add $10 billion annually to the social security trust fund. Eliminating mandatory retirement would be a start toward increasing older workers' employment levels and adding a needed stimulus to the economy and social security.

As you consider this legislation, you will hear numerous stories about its catastrophic impact. These cries of wolf were heard when the 1978 ADEA Amendments were under consideration. The difference is that today we have the benefit of extensive research to refute most of the myths and stereotypes that were prevalent in 1978.

Let me just enumerate the myths that we might consider: one, eliminating mandatory retirement will disrupt corporate personnel systems; two, eliminating mandatory retirement will cause unemployment for younger workers, women, and minorities; three, eliminating mandatory retirement would retard promotional opportunities for young workers; four, eliminating mandatory retirement will cause a decline in the Nation's productivity.

The overwhelming weight of the evidence developed by the Department of Labor in the study that was authorized by the 1978 legislation has revealed that not a single one of those fears has been realized in respect to the 1978 amendments. And we can be assured, we think, that the extension of that act would cause no more of those dislocations than the 1978 act did.

With all of the benefits we can expect from enacting the Prohibition of Mandatory Retirement and Employment Rights Act of 1982, I still do not believe this bill goes far enough. Even with this legislation, older workers will still face significant obstacles to equal employment opportunity.

One such obstacle is the policy of some employers to discontinue pension contributions for workers who are 65 or over. A second loophole in the ADEA not addressed by this bill is the provision allowing forced retirement at age 65 for some high policymaking executives who would receive $27,000 a year or more in private pension benefits upon retirement.

These and other problems must be addressed as soon as possible, but we cannot afford to hold back our efforts to uncap the ADEA. America awaits our action on this bill, and we owe it to ourselves and to our constituents to send a clear message to the Nation that age discrimination in employment will no longer be tolerated at any age.

I have said oftentimes that we think that "agism" is just as vicious and obnoxious as sexism, racism, or what used to be religious discrimination, and artificial factors of that character. Having made further strides toward eliminating age discrimination in employment, we can assess the validity of some of these other provisions that would further strengthen the act.

I am willing to forego for the time being any amendments to strengthen the ADEA's protection of older workers beyond uncapping the ADEA, but only if the same promise is made by those who would weaken the act. Here, I speak of suggestions by some business groups that the right of an aggrieved worker to have a trial by jury of his peers should be taken away, allegedly because juries are too sympathetic to older workers.

I am equally opposed to the suggestion that liquidated damage awards be abolished. To remove this provision would be to eliminate an important deterrent to future discrimination.

It is encouraging to me that this administration, despite its strong ties to business, is adamantly opposed to any change in the jury trial and liquidated damage provisions of this act.

As Senator Heinz indicated here a moment ago, I considered long and hard whether or not I personally would be willing to accept less than the full extension of the act beyond 70; that is, give the same protection to a person beyond 70 who is applying for a job as we would afford to the one that has a job, and the same protection to one seeking promotion as the one who now is permitted to carry on in the job that he has.

I do not know of any instance where, in respect to the Civil Rights Act, or any of the other sort of civil rights legislation, we have ever made a distinction between the people already employed and the people seeking employment and the people employed seeking promotion. We always dealt with them, as I understand the laws in those areas, in the same category.

However, we all realize that we cannot leap to everything we would like to achieve always in one leap. I realize that in our 1978 bill, we had to make certain concessions in order to get that bill on the statute books of the country.

So, I am willing personally to recommend to my committee—and I have discussed the matter with Hon. Gus Hawkins of California, who is chairman of the Employment Opportunities Subcommittee of the Education and Labor Committee of the House, and he will go along on accepting the extension of the act to protect those already employed and abolishing any mandatory retirement at any age in public or private employment, with minor exceptions that may be finally accepted, provided that there shall be no discrimination on account of age in respect to the continuity of employment, and provided that the Congress is willing and, of course, the White House is willing to oppose any impairment of the rights that now exist for people under 70.

We certainly would not want to go back downhill after having given people under 70 protection against discrimination on account of age with respect to the retention of a job that they have, with respect to acquiring a job when they are seeking employment, and with respect to promotion in employment.

After having given them that protection, with a right of trial by jury and a right of a forum in which to be heard, and the like, we surely, just to benefit a few, would not wish to take away from people who already have those protections, protections that now exist.

I could not conscientiously support the legislation if it were amended in that respect. I think that is a fair attitude for us to take. So, we want to be cooperative in the House with your distinguished committee here and with your body in every way we can. And we are willing to make that concession so that we can all be proud of the fact that we have achieved a great step forward in respect to mandatory retirement perhaps in this session of the Congress—I would hope it might be in this session of the Congress—with the expectation, and clearly announced on our part when the matter is being considered, that we hope at some future time to add on the other protection, too—the same protection to those seeking a job and to those seeking promotions while they are employed.

So, that basically, Mr. Chairman, states our position in the matter. We are very much pleased to be able to work with you, and want to be as cooperative as we conscientiously can. Thank you very much.

[The prepared statement of Representative Pepper follows:]

STATEMENT OF CLAUDE PEPPER, CHAIRMAN
HOUSE SELECT COMMITTEE ON AGING
BEFORE THE LABOR SUBCOMMITTEE OF THE
LABOR AND HUMAN RESOURCES COMMITTEE
AUGUST 18, 1982

Mr. Chairman and Members of this distinguished panel, I wish to thank you for the opportunity to speak in support of the Prohibition of Mandatory Retirement and Employment Rights Act of 1982. This bill is an important step toward ending the remaining vestiges of age discrimination facing our nation's workforce.

The bill you are considering, S. 2617, and its companion in the House (H.R. 6576) — which now has 179 cosponsors — is landmark legislation that makes only a small change in the Age Discrimination in Employment Act and thereby extends fundamental job protections to the more than 800,000 workers age 70 and over and to approximately 7 million older Americans who are not now in the labor force but who are interested in and capable of making a contribution to this nation's productivity.

It was just four years ago that Congress enacted legislation that I introduced resulting in the complete elimination of mandatory retirement for nearly all federal workers and an increase from 65 to 70 in the permissible mandatory retirement age for non-federal workers. Those were the 1978 Amendments to the Age Discrimination in Employment Act (ADEA).

The bill you are considering today would build upon those earlier amendments by extending the Act's coverage to most workers over 70. By so doing, it is estimated that 195,000 more older workers each year will remain in the labor force by the year 2000 than would do so under current law. This would be a substantial boost to Social Security and will help meet a growing demand for experienced labor.

The Prohibition of Mandatory Retirement and Employment Rights Act of 1982 is unlike much of the legislation before the Congress today because it is not designed just to meet the needs of a narrow constituency. Age discrimination touches the lives of every American. It is perhaps for this reason that this legislation has the nearly unanimous support of the American people. According to a 1981 nationwide Lou Harris survey commissioned by the National Council on the Aging, nine out of ten Americans of all ages believe no older person should be denied a job because of their age, as long as they are capable of performing that job. Thus, the failure to enact this legislation is not a mere disappointment to the several million older workers affected by it. It would be an irresponsible abrogration of our duty to serve the people of this country. This is compelling enough reason to act immediately on this legislation. But there are many more reasons why this bill should be enacted at once.

The increase in labor force participation by older workers brought about by enactment of this bill would come at a time when our nation begins to face critical labor shortages. These labor shortages, whch will emerge in the next five years, stem from a dramatic decline in the birthrate and a subsequent reduction in the number of young age workers entering the labor force. The Bureau of Labor Statistics reports that the population aged 18 to 24, which during the decade 1970-80 grew by 22.5 percent, will decline by 15 percent during the decade 1980-90. Moreover, our nation's colleges and universities will fall far short in meeting industry's demand for skilled workers, such as engineers and computer technicians. The result of these shortages will be an increased demand for older workers.

Encouraging older persons to remain employed longer by, among other things, removing age barriers in the workforce, is critical to our economy and important for the future of Social Security and other retirement income systems. According to a Data Resources Inc. study presented to the Select Committee on Aging earlier this year, an increase in labor force rates of older men to 1970 levels would by the year 2005 add $10 billion annually to the Social Security trust funds. Moreover, this increase in older worker employment would increase the GNP by 4 percent, add $40 billion annually (in 1980 dollars) in new federal, state and local tax revenues and provide an average annual increase of $1,050 in income to the elderly. Eliminating mandatory retirement would be a start toward increasing older workers employment levels and adding a needed stimulus to the economy.

As you consider this legislation you will hear numerous stories about its "catastrophic" impact. These "cries of wolf" were heard when the 1978 ADEA Amendments were under consideration. The difference is that today we have the benefit of extensive research to refute most of the myths and stereotypes that were prevalent in 1978. The Department of Labor has undertaken four years of study to determine the impact of eliminating mandatory retirement and the results cited in their interim report to Congress are crystal clear: abolishing mandatory retirement will have no significant negative effects on this nation's workforce.

Let's examine some of the myths you are likely to hear.

Myth #1. Eliminating mandatory retirement will disrupt corporate personnel systems. Many employers argued in 1978 that raising or eliminating the mandatory retirement age would force them to implement stricter performance evaluations that might work to the detriment of all older workers. The Labor Department study found that this did not occur. On the contrary, strict performance criteria existed alongside mandatory retirement rules rather than as a replacement for them. This finding may explain why 38 percent of the Fortune 500 companies have no mandatory retirement age and why 51 percent of employers recently surveyed said they favored the complete elimination of mandatory retirement.

Myth #2. Eliminating mandatory retirement will cause unemployment for younger workers, women and minorities. The Department of Labor, which has been studying the effects of the 1978 Amendments to the ADEA, has concluded that raising the mandatory retirement age to 70 has had no significant negative effect on youth, women or minorities. According to the Labor Department report,

> The estimated additional number of comparable age 65 workers are potential competition for less than one-quarter of one percent of all full-time workers ages 16-24; less than one-half of one percent of all full-time black workers ages 16-59; and around one-tenth of one percent of all full-time female workers ages 16-59.

Eliminating mandatory retirement would, in fact, increase the rights of minorities and women, since members of these groups also grow older. It would indeed be ironic if after years of struggling to gain their employment rights, minorities and women were to be denied these rights by the mere fact that they survive to old age.

Myth #3 Eliminating mandatory retirement would retard promotional opportunities for younger workers. Again, the findings in the Labor Department report refute this. According to a study cited by the Labor Department, a substantial increase of ten percent in labor force participation rates of men over 65, nearly twice the effect of abolishing mandatory retirement, would on average delay promotions at the highest ranks by one-half year, while at the lower ranks individual promotions would be retarded by five to ten weeks. These are insignificant effects, especially when weighed against the harmful consequences of forced retirement based on age.

Myth #4 Eliminating mandatory retirement will cause a decline in the nation's productivity. The overwhelming weight of scientific evidence refutes this myth. Older workers are more dependable, stay at their jobs longer and do as much work of similar or superior quality as younger workers. Employers understand this. Nine out of ten employers in a 1981 study by Mercer, Incorporated stated that older workers peform as well on the job as younger workers and that older workers are more committed to company objectives than younger workers.

With all of the benefits we can expect from enacting the Prohibition of Mandatory Retirement and Employment Rights Act of 1982, I still don't believe this bill goes far enough. Even with this legislation older workers will still face significant obstacles to equal employment opportunities.

One such obstacle is the policy of some employers to discontinue pension contributions for workers who are age 65 or older. A quirk in the legislative history of the 1978 ADEA Amendments allowed this loophole, and the result is that roughly one-half of all employers are taking advantage of it to freeze pension benefits at age 65 and discourage older workers from continued productive employment. The practice of freezing pension benefits at 65 is not done for cost reasons; a major new study by a prominent actuary firm that was released recently by our Aging Committee clearly demonstrates that there is no cost justification for freezing pensions at age 65. Apparently, this practice is followed either out of ignorance of the actuarial facts or, worse yet, because some employers wish to force older workers into retirement prematurely. In either case, the practice should be abolished.

A second loophole in the ADEA not addressed by this bill is the provision allowing forced retirement at age 65 for some high policymaking executives who would receive $27,000 or more in private pension benefits upon retirement. This exemption, which was included to allow employers to create turnover at the highest corporate levels, results in legalized discrimination against a selected group of employees and should be abolished. At the very least, the pension test of $27,000 should be indexed to the CPI or the wage base to ensure that this exemption is not applied too broadly.

These and other problems — such as the restrictive filing requirements required by the Act and the vague wording of the "bona fide occupational qualification" provision — must be addressed as soon as possible. But we cannot afford to hold back our efforts to uncap the ADEA. America awaits our action on this bill and we owe it to ourselves and our constituents to send a clear message to the nation that age discrimination in employment will no longer be tolerated at any age. Having done that, we can assess the validity of some of these other provisions that would further strengthen the Act.

I am willing to forego for the time being any amendments to strengthen the ADEA's protection of older workers beyond uncapping the ADEA, but only if the same promise is made by those who would weaken the Act. Here I speak of the suggestion by some business groups that the right of an aggrieved worker to have a trial by a jury of his peers should be taken away, allegedly because juries are "too sympathetic" to older workers. The jury trial provision for non-federal workers was firmly established in the ADEA in 1978 by Congress after it was earlier affirmed by the Supreme Court in Lorillard v. Pons. No conclusive evidence exists that juries are more sympathetic to older plaintiffs than are judges. If anything, juries lessen the bias in age discrimination cases because the decision is made by more than one juror, whereas a judge makes his determination alone. I believe very strongly, as I think most of our colleagues do, that the jury system in this country is fair and should be retained. It is abhorrent to think that the Congress would even consider taking away this right because some employers are worried about being sued.

I am equally opposed to the suggestion that liquidated damage awards be abolished. The ADEA allows such awards only when the employer is found to have willfully violated the Act. Under all other circumstances the plaintiff is allowed simple back pay. This is eminently fair. To remove this provision would be to eliminate an important deterrent to future discrimination.

It is encouraging to me that this Administration, despite its strong ties to business, is adamantly opposed to any change in the jury trials and liquidated damages provision at this time. The President sees these as obstacles to swift enactment of legislation to end mandatory retirement and is apparently unconvinced by the arguments that they should be altered in any way.

Last, I am strongly opposed to any special treatment for universities and colleges. In recent weeks I have heard that abolishing mandatory retirement will destroy the tenure system in higher education. I suppose the same arguments were made in support of slavery, that to abolish it would destroy the great plantations of the South. I say if the tenure system requires discrimination based on age then it should change to reflect the times. When faced with a choice between the rights of individuals and the needs of institutions our nation has nearly always opted to protect the rights of the individual. The Labor Department study offers no clear support for an exception for universities and colleges. Moreover, the Labor Department study found that "60 percent of all faculty respondents indicated that they 'favor' or 'strongly favor' complete elimination of mandatory retirement ages for faculty members."

In closing, I would again like to thank you for calling this hearing. After you have reviewed all the evidence I am confident you will agree that the best way to proceed is to enact the Prohibition of Mandatory Retirement and Employment Rights Act as soon as possible, with no amendments. The legislation would bring an end to one of the most wasteful forms of discrimination in our society and would, therefore, be good for the nation, for its older workers, and for all future generations of workers who have much to contribute well beyond their 70th birthday.

Senator Nickles. I appreciate that very much, Congressman.

Senator Hawkins, do you have any questions?

Senator Hawkins. Congressmen Pepper, our State of Florida, with 17.3 percent of the population over 65, has roughly the mix of young and old today that the rest of the Nation will experience in about 35 years when the so-called baby boom reaches retirement age. So, I think that the rest of the Nation can learn a great deal by taking heed of how your State and mine has reacted to the increased elderly population.

Do you feel that the large population of the elderly in Florida has discouraged industry from locating in our State?

Mr. Pepper. I think the elderly are an asset to our State, Senator, rather than a liability. In the first place, the State offers many inducements to the elderly for their own residence, and it would offer more if they had assurance that they could work, also, while they live there, because many of them like to work part time, at least.

I have come into some contact lately, in my own family and with friends, with what happens to a lot of older people when they come to a time when they do not have anything else to do. They do not have any incentive; they do not have anything to get up for in the morning. They do not have a concern about anything; they do not have any challenge. They are just drifting, and they usually start drifting downhill.

So, in speaking to older groups across the country, I have been trying to emphasize the concept that we are thinking about older people with a future as well as a past; that older people have not given up. If they are in good health, and many of them are, they have not given up; they have not resigned to nothingness and to being a zero.

Many of them have had illustrious lives with great accomplishments behind them. I like to think in terms of Tennyson's "Ulysses" where he says, "For my purpose holds to sail beyond the sunset and the bears of all the western stars before I die." They still have dreams.

Senator Randolph and I have got a lot we want to do before we leave this world, and there are other people just like us all over America. And we have a duty, I think, to try to open doors of opportunity to them.

I would hope that in Florida, we could establish lots of industries that would require skilled—not smoke-stack industries; we do not particularly care for that—but highly skilled positions where people could be retrained. There are people right here in Virginia, right adjacent to our city, where they employ, in a software computer plant, nothing but elderly people. They are trained to do that work when they come in there. They give them flexible hours of employment, and the company is growing rapidly. They do not employ anybody but older workers, and the older workers are finding it wonderful work to do.

So, we could give them part-time employment, we could give them full-time employment, and let them have some flexibility in their schedules. With our large population, and I am sure it is going to increase, it would mean a lot to us, Senator Hawkins.

Senator **Hawkins**. I think it is an interesting observation that the fastest growing electronics industries that have been locating in Florida have chosen Broward County, Pinellas County, Sarasota, and Palm Beach Counties, where there are large concentrations of the elderly, probably for the very reasons that you have discussed.

Do your statistics and studies show that older workers are more dependable than younger workers?

Mr. **Pepper**. Yes. All the data shows that older workers are more punctual. They say you take a bad day when it is maybe raining, or the snow is falling, or it is cold, and you will find those older workers usually right there on the job. They do not want to lose that job because they know the difficulty they would have in getting another, and they have a sense of obligation.

So, all employment records show that the older workers are more punctual, generally more responsible, and now equally as productive as the younger worker.

Senator **Hawkins**. How about the factor of loyalty to their employers?

Mr. **Pepper**. They are people who have lived a long time; they know the principles of loyalty. They have lived by them; they know what they mean in our society, so they are loyal to their employer.

Senator **Hawkins**. Are there any statistics that you are aware of that show that when some individuals are forced to retire because of their age, they become so depressed at what they might perceive as their lack of usefulness that it may affect their lifespan?

Mr. **Pepper**. It does affect their lifespan adversely, and particularly adversely affects their health. You will find that most cases of depression among elderly people are attributable to the fact that they have been given nothing to do. They are out of the job to which they have been accustomed. They do not have any hope in life, any incentive or any challenge. It would be a great boon to the health and to the longevity of the elderly to have a longer opportunity for their life's work.

Senator **Hawkins**. Thank you, Senator.

Mr. **Pepper**. Thank you, Senator. We are pleased at your fine leadership in this field.

Senator **Nickles**. Thank you, Senator Hawkins.

Senator Randolph.

Senator **Randolph**. Claude, I want to call you "Claude." I remember, of course, when you came to the Senate of the United States, not by way of the House of Representatives, but then became a Member of the body you are now, serving so well the constituency of your district.

It does not mean much, but I want the record perhaps to carry these words. There has been a larger percentage of suicides among young people than among older people. That figure I will place in my statement, but it is a demonstration that age does not mean that people, as they become older, are going to be suicidal. The figures show just the reverse.

Henry Gassaway Davis was the oldest man to the point I am now speaking to ever be nominated for Vice President. He was a West Virginian from the town of Elkins, where I have my home. He, at the age of 84, was our candidate of the Democratic Party; that is, in 1904. And he was very vigorous and very active. He lived into his nineties.

Of course, he rode horseback through the snows and took some fever, and that was perhaps his undoing. But I am trying to say seriously that in that convention in 1904, the delegates, in nominating him for a Vice Presidential post, did not have any antipathy toward Henry Gassaway Davis because he was in his eighties. They knew he was vigorous.

So, it depends, does it not, Claude, on the person?

Mr. PEPPER. Exactly.

Senator RANDOLPH. So, you cannot put any ceiling on people. That is artificial, is it not, certainly, to have a ceiling?

In West Virginia, Paula, we have about 17 percent of our citizenry over the age of 60. I believe at the present time, although we do not take it in categories, about 12 percent are over the age of 65, and something like 7 or 8 percent are over the age of 70.

Now, these people are not a drag on the economy of West Virginia, and they will not be a drag on the economy of this country.

Your arguments are very compelling, and I am grateful for the opportunity, as are others, to stand alongside of you in this fight. We believe that, in a sense, there are many who misunderstand this issue. I hope, and I know you hope, that this measure can pass in the year of 1982, not to be postponed again as it has in the past.

How do you feel that President Reagan feels about this bill?

Mr. PEPPER. My information comes from the appearance of the Under Secretary, who I think will be a witness before your committee, who appeared at a public hearing before our Aging Committee in the House and stated the President's position. He said the President favored, as he announced in a press conference that he had released, removing of the 70 cap with respect to antidiscrimination in employment. He favored removing that entirely so that there could be no mandatory discharge of anybody on account of age at any age in private employment.

But he said the President was not willing at the present time to go along on the other two categories—those seeking employment and those seeking promotion in the employment that they have.

So, as I said a while ago, after long thought about the matter, my committee, the Aging Committee, and the Education and Labor Committee in the House I believe will go along with that limitation, with the understanding that we do not take away any existing rights. And we all look forward to the time when we can amend our legislation and include the other two categories as well as those already employed.

Senator RANDOLPH. Is the President of the United States, Mr. Reagan, 70 years of age or older?

Mr. PEPPER. He is over 70; he is 71.

Senator RANDOLPH. Yes. If he wanted to run again, it would be OK, is that correct?

Mr. PEPPER. Yes. The President is the most shining example, I guess, we have that a man can so successfully discharge the duties of President; that is, as far as health and ability to mentally and physically meet the challenge of that challenging office.

Nobody ever thinks about the question that he is over 70 years of age, and yet he is the oldest President we have ever had. A long time ago, people would have said a man that old cannot be President of the United States, and some would say you and I are too old to be Senators.

But if you and I were in the hospital a great deal of the time—with some of the old Senators up here, they used to come and pick them up in an ambulance and take them out, and the bells would be ringing and all that. [Laughter.]

Mr. **Pepper**. But as long as you are at home, around and among the people, and active and talking to them and mentally and physically alert, they are not going to be, in my opinion, very much disturbed about the number of birthdays that you have been fortunate to have.

Senator **Randolph**. A final question. How old are you, Claude?

Mr. **Pepper**. I will be 82 on September 8.

Senator **Randolph**. Is there any person more vigorous in this room than you?

Mr. **Pepper**. Well, I am a little bit proud of my buck dance that I do. I will not take occasion here to do it. [Laughter.]

Senator **Nickles**. Can you demonstrate that?

Mr. **Pepper**. Senator Randolph, I cannot keep up with you.

Senator **Randolph**. I think really—and it is not a play on words—I want the record to show you are an inspiration to the people of this country.

Mr. **Pepper**. I appreciate that I live in a country where they will not bar you. I came to the House when I was 62 years old. Under the old rules of mandatory retirement, as it were, I would have been within 3 years of being forced out.

I know I have lived much longer because I have been privileged to be active and busy doing things that I thought meant something to my fellow citizens and the like than otherwise I would have.

Senator **Randolph**. Do you remember Senator Neely of West Virginia?

Mr. **Pepper**. Very well; very well.

Senator **Randolph**. He served in the Senate well passed the age of 80, vigorous and doing the job.

Mr. **Pepper**. Yes.

Senator **Randolph**. I thank you very much.

Mr. **Pepper**. Thank you, Senator.

Senator **Nickles**. Congressman Pepper, thank you very much for your input. We appreciate it very much.

Mr. **Pepper**. Thank you, Senator.

Senator **Nickles**. Our next guest today, representing the administration, is Malcolm Lovell, who is Under Secretary for the Department of Labor.

I might mention to all of our guests that we are in session and it is quite possible we will have votes this morning. Pursuant to our previous request, I will again request that all of our panelists keep their oral remarks within 5 minutes, and your written statements will be entered into the record in full.

Mr. Lovell, we very much appreciate your appearing before our committee today. Please proceed.

STATEMENT OF MALCOLM R. LOVELL, JR., UNDER SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, ACCOMPANIED BY MALCOLM H. MORRISON

Mr. **LOVELL**. Thank you very much, Mr. Chairman and Senator Randolph. I am very pleased to have this opportunity to appear before you today to discuss the administration's position on the issue of mandatory retirement and other forms of age discrimination, and to discuss briefly the recommendations we intend to include in the final report mandated by section 5 of the 1978 Age Discrimination in Employment Act Amendments.

I will give brief remarks, Senator.

Senator **NICKLES**. Thank you. Before you begin, let me get a little more order in the room. We would like for everybody to be able to hear your statement. Please proceed.

Mr. **LOVELL**. Thank you. As you know, the President feels strongly about eliminating mandatory retirement. His April 2 statement is instructive of his feelings on this issue: "When it comes to retirement, the criterion should be fitness for work, not year of birth. We know that many individuals have valuable contributions to make well beyond 70 years of age and they should have the opportunity to do so if they desire."

Mr. Chairman, we believe our older workers are a resource that we must use more creatively in the future. Medical evidence clearly shows that productive work performance can easily continue long beyond age 70, and that forced retirement often has detrimental effects on health. In addition, forced retirement can result in financial difficulties for older workers with inadequate pensions who face lengthened periods of retirement.

Also, mandatory retirement unnecessarily removes employees from the workforce who could otherwise contribute to the Social Security program, and thus lessen the financial problems of that system. Finally, our economy will continue to become more technologically oriented in the years ahead, reducing the physical demands on employees. For these reasons, forcing people to retire at age 70 is no longer justified.

In accordance with the April 2 announcement, the administration supports legislation that will end mandatory retirement and eliminate the age 70 cap contained in section 12 of the act for all personnel actions except hiring and promotion.

Let me emphasize what a monumental step the President is proposing for America—no longer will it be legal for an able-bodied person to be retired or forced to retire at some arbitrary age. No other President has ever proposed enactment of such legislation.

Now, I want to turn to the study and recommendations mandated by section 5 of the act. As you know, section 5 requires the Department "to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement."

Further, the 1978 amendments require the Department of Labor to examine the effects of raising the upper age limitation to 70 years of age; to determine the feasibility of eliminating or raising the age 70 limitation; and to examine the effect of the executive and academic exemptions.

To meet this requirement, the Department conducted three major analyses: One, Analytical Studies of the Effects of Raising the Mandatory Retirement Age (including the executive exemption); two, The National Survey of Employer/Employee Response to the 1978 Amendments; and, third, The Academic Retirement Study (a Study to Examine the Tenured Faculty Exemption in the ADEA).

Now, as I stated before, though we are not ready to release the study mandated by section 5, although we will be shortly, I can outline for you the recommendations that we intend to make in the study. I assure you that we are working as quickly as possible to release the final report.

Our recommendations will include: One, elimination of the cap on mandatory retirement, as outlined earlier in my testimony; two, retention of the executive exemption in the ADEA; three, providing a temporary exemption for tenured faculty members; four, review of other statutory provisions affecting the elderly.

I recognize this is a very cursory review of the report and recommendations, and I would welcome the opportunity to appear before you when the final report is issued.

Mr. Chairman, over the past few months, the administration has been discussing these matters with Members of Congress in order to determine the feasibility of enacting this year mandatory retirement legislation consistent with the President's position. The President believes this is the right thing to do and that this is the right time to do it. I must tell you that we are very optimistic about the possibility of enacting such legislation, and I look forward to the support of the members of this subcommittee. I welcome Mr. Pepper's statesmanlike recommendation in this regard.

Mr. Chairman, I appreciate the opportunity to testify before you today and I would be pleased to answer any questions that you may have.

[The prepared statement of Mr. Lovell follows:]

STATEMENT OF MALCOLM R. LOVELL, JR.
UNDER SECRETARY OF LABOR

BEFORE THE

SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

August 18, 1982

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to appear before you today to discuss the Administration's position on the issue of mandatory retirement and other forms of age discrimination, and to discuss briefly the recommendations we intend to include in the final report mandated by Section 5 of the 1978 Age Discrimination in Employment Act Amendments.

As you know, the President feels strongly about eliminating mandatory retirement. His April 2 statement is instructive of his feelings on this issue. "When it comes to retirement the criterion should be fitness for work, not year of birth... We know that many individuals have valuable contributions to make well beyond 70 years of age and they should have the opportunity to do so if they desire."

Mr. Chairman, we believe our older workers are a resource that we must use more creatively in the future. Medical evidence clearly shows that productive work performance can easily continue long beyond age 70 and that forced retirement often has detrimental effects on health. In addition, forced retirement can result in financial difficulties for older workers with inadequate pensions who face lengthened periods of retirement. Also, mandatory retirement unnecessarily removes employees from the work force who could otherwise contribute to the Social Security program, and thus lessen the financial problems of that system. Finally, our economy will continue to become more technologically oriented in the years ahead, reducing the physical demands on employees. For these reasons, forcing people to retire at age 70 is no longer justified.

In accordance with the April 2 announcement, the Administration supports legislation that will end mandatory retirement and eliminate the age 70 "cap" contained in Section 12 of the Act for all personnel actions except hiring and promotion. Let me emphasize what a monumental step the President is proposing for America--no longer will it be legal for an able-bodied person to be retired at some arbitrary age. No other President has ever proposed enactment of such legislation.

Now I want to turn to the study and recommendations mandated by Section 5 of the Act. As you know, Section 5 requires the Department "to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement." Further, the 1978 Amendments required DOL to examine the effects of raising the upper age limitation to 70 years of age; to determine the feasibility of eliminating or raising the age 70 limitation; and to examine the effect of the executive and academic exemptions.

To meet this requirement the Department conducted three major analyses:

(1) Analytical Studies of the Effects of Raising the Mandatory Retirement Age (including the executive exemption),

(2) The National Survey of Employer/Employee Response to the 1978 ADEA Amendments, and

(3) The Academic Retirement Study (A Study to Examine the Tenured Faculty Exemption in the ADEA).

Last December, we transmitted to the Congress the Interim Report of the Section 5 study. We are now in the last stages of completing the final report which should be transmitted to you in the very near future. Before discussing our recommendations, let me first review a few of the general findings we have made. Raising the mandatory retirement age from 65 to 70 has had only a small impact on employees' decisions to retire. In our survey, only 1 percent suggested that they would retire later due to the higher mandatory retirement age in the ADEA. We project that the raise in the mandatory retirement age to 70 will provide employment to 250,000 more persons 62 to 69 years of age by the year 2000. This represents an increase of about 5 percent of the total older workforce. We project complete elimination of mandatory retirement would result in a further increase in the labor force of approximately 200,000 elderly workers by the year 2000. While this may be of marginal importance in the overall labor force, it will be of immeasurable benefit to those thousands of employees who want to remain employed.

As I stated before, although we are not yet ready to release the study mandated by Section 5, I can outline for you the recommendations that we intend to make in the study. I assure you that we are working as quickly as possible to release the final report. Our recommendations will include:

(1) Elimination of the cap on mandatory retirement as outlined earlier in my testimony;

(2) Retention of the executive exemption in the ADEA. This exemption allows businesses to retire high policymaking persons or bona fide executives between the ages of 65 and 70 who have been in their positions for at least 2 years and who will receive pensions of at least $27,000 annually. Fully 40 percent of all firms are using the exemption or are considering using it. More significantly, 75 percent of all executives covered by the exemption work for firms that use it. These firms are generally the largest firms in the country which need the flexibility to make timely changes in leadership. Accordingly, we strongly support retention of the exemption. We would point out, however, that if the cap on mandatory retirement is eliminated, the age 70 cap in the executive exemption would have to be eliminated to be consistent.

(3) Provide a temporary exemption for tenured faculty members. In the 1978 amendments, Congress exempted tenured professors from the new age 70 cap on mandatory retirement, permitting institutions of higher learning to retire tenured professors between the ages of 65 and 70 until July 1, 1982. As part

of the Section 5 study, we were required to examine the effect of the academic exemption and the effects of removing it. Due to lack of experience with the age 70 criterion, our data are insufficient and it is very difficult to project what total elimination of the cap would mean for the academic community. We recommend, therefore, providing an academic exemption at age 70 for a temporary period so that a fuller examination can be made.

(4) Review of other statutory provisions affecting the elderly. There are a number of other provisions in various laws that have a significant impact on retirement policy, especially relating to business and to the decision of elderly persons to retire. These provisions would include issues such as pension accrual, liquidated damages, jury trials, hiring and promotion. We believe that Congress needs to carefully review these provisions as part of the coming effort to set a coherent national retirement policy for the end of the century and beyond. Of course, the Administration is ready to help in any way it can.

I recognize this is a very cursory review of the report and recommendations and I would welcome the opportunity to appear before you when the final report is issued.

Mr. Chairman, over the past few months the Administration has been discussing these matters in order to determine the feasibility of enacting this year mandatory retirement legislation consistent with the President's position. The President believes this is the right thing to do and this is the right time to do it. I must tell you that we are very optimistic about the possibility of enacting such legislation and I look forward to the support of the Members of this Subcommittee.

Mr. Chairman, I appreciate the opportunity to testify before you today, and I would be pleased to answer any questions which you and the Subcommittee Members might have.

Senator NICKLES. Thank you, Mr. Lovell.

Mr. Lovell, the 1978 amendments to the Age Discrimination Act mandated that a report on their impact be released in final form by January. I believe an interim report was made, but the final report is yet to be released. Can you tell the subcommittee why we have not seen the final report yet?

Mr. LOVELL. Well, Mr. Chairman, I am not proud that it has taken us this long, but it has been concluded now and I have given instructions that the report be moved through the normal clearance process that we do have to go through. And I am hopeful that early in September, it will be available to you.

Senator NICKLES. The report has actually been finished and you are trying to get it cleared?

Mr. LOVELL. It is finished and it is a matter of going through clearance, which, as you know, sometimes takes a long time.

Senator NICKLES. OK. To summarize some of the basic elements in your statement you would be in favor of taking off the cap for mandatory retirement, but not as far as promotion and hiring. Is that correct?

Mr. LOVELL. Yes, that is right.

Senator NICKLES. You also want to keep in the executive exemption that is presently in ADEA?

Mr. LOVELL. That is correct.

Senator NICKLES. And you want to reinstate the tenured faculty member exemption?

Mr. LOVELL. Well, we just think that should be addressed; more study is needed. The study that we did on the exemption for tenured professors was flawed because we did not have access to the kinds of data that we would need to make a firm recommendation to this Congress. Many of the academic institutions already had an age 70 retirement age. Therefore, we really did not have the data.

The academic community does have serious problems that need to be studied and need to be considered, and I am hopeful that both they and the members of this committee and the Members of the House can work together to develop language that is acceptable and that will allow this kind of study to take place.

Senator NICKLES. I understand that Mr. Morrison, who is at your left, has been active in that report.

Mr. LOVELL. Malcolm Morrison has been very active in it, and he has assured me that he is going to do everything he can to make sure that it becomes public in the very near future.

Senator NICKLES. I appreciate that.

Senator Randolph, did you have any comments or questions for Mr. Lovell?

Senator RANDOLPH. Secretary Lovell, you have talked with me. It has been a privilege to meet you in our office to discuss this legislation.

I am wondering if it is advisable for the academic community at the collegiate and university level to think that tenure should be at variance; that the officials within the university or college or institution of higher learning should have the reason of an age to say to the professor, "You shall not teach longer in this institution because you are of a certain age." What do you think about that?

Mr. Lovell. Well, Senator, I do recognize that academic institutions are going through a very critical period. First of all, we have had a situation where the demographics of those in school are changing. The build-up that took place to educate this so-called "baby boom" after World War II is changing, and we have, in some instances large numbers of faculty that are not as necessary as they were in the past.

This problem of maintaining the integrity of academic freedom and dealing sensitively with this problem of really a larger supply currently of professors than may be needed over the years ahead is a serious one. I do not know the answer to it. I do have confidence that answers can be found.

I believe the academic community is prepared to deal intelligently and realistically with it. The concept of tenure, of course, as you know, is held—and I am speaking conservatively when I say this—in great esteem; that is an understatement. It is a very important aspect of their view of academic freedom.

But I do feel that this problem can be resolved. Certainly, the basis of your question is the principle—the principle is clear in my mind that age should not be a factor in discrimination. And I just would hope that it is possible for this committee and this Congress to work out something with the academic community so that their very real problem can be dealt with, and at the same time maintaining the integrity of the desire of all of us not to have age discrimination in retirement.

Senator Randolph. It is a difficult concern to you and to me and others.

Mr. Lovell. Yes.

Senator Randolph. We must be very careful in whatever language is written that there is no implication that tenure has to do with the actual age of the person. Is that correct?

Mr. Lovell. Well, I think one has to be very careful as this language is written. I know that one of your witnesses, Dr. John Dunlop, who is a distinguished leader of the academic community, a professor, a former Secretary of Labor, and a distinguished American—I am sure that under his guidance and that of his associates in the academic community, some kind of acceptable language can be worked out.

Senator Randolph. Thank you for your helpful testimony.

Mr. Lovell. It is nice to talk with you, sir.

Senator Nickles. Many of us have talked about mandatory retirement. Is there anything in the present law that says an individual cannot work past the age of 70?

Mr. Lovell. No.

Senator Nickles. Is there anything that prohibits an employer from keeping an employee on past the age of 70 under present law?

Mr. Lovell. Not to my knowledge, Senator.

Senator Nickles. I think that point needs to be made.

Senator Quayle, we appreciate your being with us today. Did you have any particular questions that you wanted to ask of Mr. Lovell, who is representing the administration?

Senator Quayle. Yes, I do. Give me a few minutes to get adjusted. I will try to accommodate the chairman.

First of all, I want to thank you for appearing here and testifying. Mr. Chairman, I do have a statement that I would like to ask unanimous consent for it to appear in the record.

Senator **Nickles**. Without objection, we will have your statement appear in the record at the insertion of the others, as well as a statement by Senator Hatch.

[The prepared statements of Senators Quayle and Hatch follow:]

Prepared Statement of Senator Quayle.

Mr. **Quayle**. Mr. Chairman, thank you for your consideration of the age discrimination issue. There are many older Americans and many employers concerned about the role our experienced, older workers will play in the future labor force.

As a result, I have introduced the Age Discrimination in Employment Amendments of 1982. It is a bill to amend the Age Discrimination in Employment Act of 1967, eliminating the upper age limitation of 70-years-of-age, making procedural reforms and reinstating the tenured faculty exemption.

My bill has three major purposes:

The first is to remove the current 70-year cap on the protections afforded by the Discrimination in Employment Act.

The second is to make procedural reforms in the enforcement provisions of the Act to make it more consistent with other employment discrimination statutes; and

The third is to restore the exemption from the ban on mandatory retirement for tenured faculty members which expired at the beginning of last month.

I decided to introduce this bill after meeting with others and discussing various approaches to amending the ADEA. My bill has been introduced with the idea that all issues should be placed on the table for consideration, so that when the Committee and Congress take action, it will be after a full examination of the alternatives.

My bill would lift the mandatory retirement age of 70. This provision is based on the right of older workers to continue working, if they are able and willing to do so, and is supported by the fact that conditions which once justified encouraging early retirement of older workers are changing.

Recent surveys have also shown that nine out of ten Americans oppose forced retirement because of age. The Administration has already spoken out in favor of prohibiting mandatory retirement of individuals over the age of 70. My bill would eliminate, not only mandatory retirement, but also all other discrimination against workers over age 70.

In addition, my bill revises the enforcement procedures. What is appropriate as an individual's remedy for discrimination on account of race or sex or national origin is also appropriate for discrimination based on age. That is why I have revised the enforcement procedure to eliminate the jury trial and liquidated damage provisions, replacing them with equitable relief provisions as found in other antidiscrimination statutes.

When the ADEA was amended in 1978, raising the mandatory retirement age from 65 to 70, a temporary exemption for tenured faculty was provided so that such faculty could continue to be retired at age 65. I am concerned that without this exemption, colleges and universities may be faced with eliminating tenure, or substantially altering it, with potential chilling effects on academic freedom and consequently on teaching, faculty morale and the advancement of knowledge.

A stipulated mandatory retirement age of 65 for tenured faculty, which is a feature of my bill, has the important advantage of allowing institutions to achieve the positive purposes which tenure provides while simultaneously assuring some regular degree of turnover. Tenure is an effective device to assure academic vitality, but it probably will not endure in the absence of a mandatory retirement age.

I ask unanimous consent that these remarks be included in the record of this hearing.

Prepared Statement of Senator Hatch

Mr. **Hatch**. I would like to begin by thanking Senator Nickles for holding today's hearing on S. 2167, a bill to prohibit mandatory retirement. In the past, Congress has been correctly criticized for passing legislation without first understanding fully its potential impact. We have an opportunity today to establish a thorough record if the arguments in favor of and in opposition to this bill. I think, Senator Nickles, that the excellent work done by you and your staff in assembling today's witnesses will ensure that our consideration of S. 2167 bill be based upon fact and not simply upon theories or presumptions.

As a cosponsor of S. 2167, I feel strongly that all persons, regardless of age, should be given the opportunity to be judged on the basis of their own skills and experience. They should not be arbitrarily excluded from work simply because of the inexorable passage of time.

Mandatory retirement is an employment policy that discounts the record of the individual. It fails to acknowledge the contribution that older workers have made, are making, and will continue to make in the work place. It disregards the importance of experience, skill and dedication. Moreover, it may prove to be a disservice to our nation's economy be ignoring a known resource if skilled, proven workers at a time when our country is growing skill-deficient.

In 1972, Earl Cox was a well known and respected principal of the Edgemont School in Sandy, Utah. He was described by the school administrator there as one of the best principals in the entire Jordan school district. Yet when he turned 65 that year, he was manditorily retired because of his age. No one can question, however, whether Mr. Cox still had much to contribute. After he lost his job, he joined forces with the American Association of Retired Persons and the Retired Teachers Association to have the state age discrimination statute amended. Due in no small part to his efforts, there is today no cap on Utah's prohibition against age discrinination.

It is clear that we should be trying to keep men and women such as Earl Cox in the work force instead of arbitrarily dismissing them for no other reason than their own health and longevity. I feel that an important first step would be for the Federal Government to follow the example of the Utah legislature and uncap the Age Discrimination in Employment Act.

Uncapping the Act is not, however, an isolated step. Passage of S. 2167 will have a direct impact on numerous employment policies and procedures, such as employee disability plans, safety reqirements and regulations, and training programs. For this reason, I am glad to see that the witnesses today will include representatives from the employer community.

We tend to forget that the achievement of equal employment opportunity is not simply a function of the passage of laws. Employers are the ones that provide employment, and they must provide it in a forum in which there are at least three often competing interests—the needs of those in the work force, the expectations of shareholders and creditors, and the mandates found in Federal and State statutes. Consequently, I feel it is important to develop for the record the employer community's perception of the impact that S. 2167 will have on the employment policies and procedures of this nation's businesses, industries and academic institutions.

I also hope that today we will receive specific testimony addressing the three questions I have raised concerning the bill, namely: What impact will S. 2167 have on youth unemployment, especially that of young minorities and women; what impact will it have on the relationship between the Act and apprenticeship programs; and what impact will the bill have on the Act's executive exemption.

Again, I want to thank Senator Nickles for holding this hearing. We can only benefit by taking the time to ascertain fully the ramifications of this important piece of legislation prior to what I hope will be its ultimate passage.

Senator **QUAYLE**. As Mr. Lovell and the chairman know, I have introduced a piece of legislation that basically puts all the issues on the table, and this was my reason for introducing S. 2844, the Age Discrimination in Employment Amendments of 1982. I think that as this committee tries to digest this issue, we ought to factor in not only the age discrimination cap that I want to see lifted, and I know you do and I know the President does, but some of the circumstantial issues that are related to this, such as liquidated damages, a jury trial, and tenure in education. These issues all should be discussed, and we will be having a response.

I beg your indulgence and forgiveness. I have not read your entire testimony. I do not want to go back if you have already answered this question, but I know the discussion on lifting the mandatory retirement of 70 and getting the cap off would also be used—wait a second.

[Pause.]

Senator QUAYLE. I understand that the exception would be on hiring and promotion.

Mr. LOVELL. That is right, sir.

Senator QUAYLE. I wonder what kind of difficulties this might include on hiring and promotion. If you have already addressed this——

Mr. LOVELL. I do not think I have expressed to this committee the rationale of excluding hiring and promotion, and I think it is based primarily on the recognition that when individuals are hired or promoted to new responsibility, companies very frequently—not always, but very frequently—make investments in them which they expect to be amortized over a longer period of time.

It is just our feeling that when you are talking about hiring and promoting people over 70, obviously one does not have as long a time to amortize that kind of investment and training in the individual. Therefore, that should be excluded when we lift the age 70 cap on the other personnel actions.

As a matter of fact, in addition to that, in terms of the nature of the problem, in our studies I believe it is indicated that about 3½ percent of all the complaints filed at EEOC did concern hiring and promotion. The vast majority of them were for other personnel actions such as discharge and retirement and things of that character. We are suggesting that those caps be removed.

Senator QUAYLE. Just two other questions, Mr. Chairman.

Title VII of the Civil Rights Act which prohibits race and sex discrimination—under that title, it does not provide for jury trials or liquidated damages. Here, we are dealing with age discrimination and I wonder if the enforcement provisions of age discrimination should not be the same as for sex and race discrimination.

We are making a distinction here, and I wonder if you might elaborate for us on the reason for that distinction.

Mr. LOVELL. I think I have to differentiate between the process by which these various complaints are adjudicated and the basic principle.

The President is recommending that the principle of mandatory retirement be eliminated. We think that can be done this year. As you know, the conversations that we have had in the House and Senate and some of the comments that have been made today suggest that that kind of legislation can conceivably be passed this year.

When you get into some of the technical aspects about how the law is to be enforced, there are reasonable arguments on all sides. We think that introducing those questions this year would make it very difficult, if not impossible, to get legislation through the Congress this year.

So, I have personally offered the good offices of the Labor Department to meet with the parties—the elderly community, the business community, and other interested groups—to see if some of these, what I call really procedural differences, can be worked out.

In addition to those that you have mentioned, you have the pension accrual question, which is one that is bothersome to many people as well. So, we are not talking today in terms of resolving all of the legitimate concerns and questions that all of the parties have in terms of how age discrimination matters are to be handled.

I look forward to working with this committee and other groups in the years ahead on these and other issues.

Senator **Quayle**. The real thrust of this, though, to make it work, is the area of enforcement, to go ahead and eliminate this discrimination, which in this case would be age discrimination. I keep coming back to the enforcement aspect.

I think the data that we have from the Equal Employment Opportunity Commission shows that the number of cases filed under ADEA are increasing at a much faster rate than those that are filed under title VII. But the percentage that is being settled is decreasing.

Now, if that is true, which I presume it is—if not, maybe you can correct that statement—but if that is true, that you have an increase in cases but less being resolved, are we not really passing a law that we will have trouble enforcing? Maybe, therefore, we ought to be looking at this particular time, when we are dealing with this retirement age, at the issue of jury trial and liquidated damages and other applications under title VII of the Civil Rights Act.

Mr. **Lovell**. Well, no, Senator. I do not think it is necessary to resolve those differences in order to move forward on lifting the age 70 cap on retirement. I do not think that these procedural differences regarding liquidated damages and jury trials, or the comparability between title VII—there are other aspects of title VII that I know the business community would not necessarily want to see brought to bear on age discrimination cases—are issues that need to be resolved immediately.

But I do think it is important in acts of this kind that when you deal with procedural matters, the concerns of all the parties be weighed very carefully. That is why I say I think that it is possible that by the parties getting together in discussions over a lengthy period of time, some agreement can be reached so that these laws can be quickly and equitably and fairly enforced in this country. But I do not think it all has to be done now.

Senator **Quayle**. Let me go back to the first part of that question. Is it true that the number of cases that are being filed under ADEA is increasing, but the actual percentage being settled is decreasing?

Mr. **Lovell**. Malcolm Morrison tells me that that basically is so. It would be my guess—let us see, I have got some figures here. In 1980, title VII cases went from 141 to 171. Now, that is a 22-percent increase, but we are not really talking about very large numbers.

I mean, when you think, Senator, that we have got over a million people today over 70 years old that are working in the labor force—I think it is 1,700,000—lifting this age 70 cap is going to make a difference of about 200,000 people in the work force by the year 2000.

Senator **Quayle**. According to the statistics that I have before me, the settlement rate—I am talking about the settlement rate.

Mr. **Lovell**. I am, too.

Senator **Quayle**. For fiscal year 1981, you are talking about a title VII settlement rate of 43 percent; a settlement rate for ADEA of 23 percent.

Mr. **Lovell**. Yes.

Senator **Quayle**. Now, that is one-half of the settlement rate, and I think that is a key factor. I mean, if we are going to put a law on the books, we want to get settlement; we want to get enforcement. And if those numbers are erroneous——

Mr. **Lovell**. No, I do not think they are wrong, but may I ask Mr. Morrison to respond to that rather than my just repeating what he is telling me?

Senator **Quayle**. Sure.

Mr. **Morrison**. I think the first thing to recognize regarding these rates is that there has been very little experience since the increase in caseload confronted the EEOC. This increase primarily took place in 1979 and 1980; that is when it was first noticed by all of us here. So, we have very little experience as to the distribution of cases and as to what the procedures have been.

With regard to the settlement situation, no one, to my knowledge, has investigated why the settlement rate is the way it is. There could be technical reasons for that kind of a settlement rate. It could be problematic in the EEOC. There were some oversight hearings that were held at least 2 to 3 years ago about the EEOC's handling of the ADEA cases, and they pointed out some problems that the EEOC was then facing.

I do not know, nor do I believe there is any evidence available to us that would indicate the causes for that settlement rate. I am not disputing the figure at all, but I do not think we can jump to conclusions. We have a situation that is being put into a transition at the present time with an increasing caseload; no question about it. But I do not think we have the facts.

Senator **Quayle**. All right. Since we do not have the facts, at least it is agreed upon that the settlement rate for ADEA is about one-half of what it is under title VII—43 percent versus 23 percent. Title VII has twice as high a settlement rate as does ADEA.

Now, you say that there is no data available that will substantiate the reason for that, so we do not know. But let me just make a guess and put it on the table. It might be that the different processes by which we go about settling these cases might have something to do with the vast difference in this settlement rate.

I am just going to put that on the table and try to get that question answered. And if I am correct and if there is supporting data to that, then I would hope that people would really give some reconsideration to this movement of not changing the procedure and the process.

Now, if I am wrong on that guesstimate at this particular time, fine. But on first blush, and with the very first witness on this issue, this could be a very important concern.

Mr. **Lovell**. Senator, we are not questioning that this is a problem. Even if we can stipulate your hypothesis on it, I do not think that it would be possible to work out legislation this year to be able to deal with these procedural questions. But I accept the fact that they are questions. We will continue to study it.

We will work with you and with the other interested parties to try and get at the heart of the question it and to try and get agreeable solutions to it. I think you are quite correct in addressing the problem, Senator. I guess the only difference we might have is the fact that we do not feel it has to be resolved prior to the time of taking action on the legislation that the President is proposing.

Senator QUAYLE. Well, Mr. Chairman, my time is up. I will just pledge to you Mr. Lovell, that I will be more than happy to work with you and our chairman and other interested persons on this issue. It is just my idea that when we are going to pass legislation, all the issues should be on the table. Furthermore, we ought to try to get the best possible remedy in the legislation that is politically feasible.

Mr. LOVELL. Yes.

Senator QUAYLE. I realize that there are politics in the thing, and there may have to be some give and some take. But, you know, when we get into these issues and we see things like that, as one person who is interested in the issue and also interested in the institutional process of how legislation can move forward, I think it behooves us to point these out and have a thorough discussion on them.

Thank you very much, Mr. Chairman.

Senator NICKLES. Thank you, Senator Quayle. I think you brought out very good points, and our committee will request that information for the record from EEOC, which I think can be helpful to all of us.

Mr. Lovell, we appreciate your testimony, and also, Mr. Morrison, your appearance before the committee today.

Mr. LOVELL. Thank you, sir.

Senator NICKLES. On our next panel is Robert Thompson, who represents the Chamber of Commerce of the United States; David Braithwaite represents the National Association of Manufacturers; and Charles Bakaly from Los Angeles, Calif.

Gentlemen, welcome. I want to repeat the necessity for all of our panelists, to confine your oral remarks to 5 minutes. We will insert your written statements in the record in full.

Mr. Thompson, we welcome you again before our committee. You have been before us many, many times.

I might ask for a little more order in the Committee room. Mr. Thompson has the right to be heard and we look forward to his testimony.

Senator RANDOLPH. Mr. Chairman, will you indulge me a statement?

Senator NICKLES. Certainly.

Senator RANDOLPH. I have another committee where I, of necessity, must be. I want all the witnesses who are yet to be heard today to know that I wish that I might have heard them personally, being part of the subcommittee or the committee. That does not mean that I will not read the testimony very carefully.

This is a very vital subject that we are attempting to carry forward into possible legislation that will become law, and we must be well-reasoned in what we do. Yet, Mr. Chairman, we must act on a matter of this kind; we must not postpone it until another year, and another year, and another year. We must come to grips with these problems.

Frankly, I think we need, as a Congress and as an administration, to not act in any mamby-pamby fashion, but make an all-out, frontal attack on this subject matter—well-reasoned, as I have indicated. But those people who can be productive workers should not be dismissed because of age. Is that correct?

STATEMENT OF ROBERT T. THOMPSON, CHAIRMAN, LABOR RELATIONS COMMITTEE, AND REGIONAL VICE CHAIRMAN, BOARD OF DIRECTORS, CHAMBER OF COMMERCE OF THE UNITED STATES, WASHINGTON, D.C., ACCOMPANIED BY G. JOHN TYSSE, DIRECTOR, LABOR LAW, CHAMBER OF COMMERCE OF THE UNITED STATES, AND CHRISTOPHER LUIS, LABOR LAW ATTORNEY, CHAMBER OF COMMERCE OF THE UNITED STATES; DAVID BRAITHWAITE, DIRECTOR, CORPORATE EMPLOYMENT, UNITED STATES STEEL CORP., PITTSBURGH, PA., REPRESENTING THE NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY BRENDA MCCHRISTON BROOKS, DIRECTOR, HUMAN RESOURCES AND EQUAL OPPORTUNITY, NATIONAL ASSOCIATION OF MANUFACTURERS; AND CHARLES B. BAKALY, JR., LAW OFFICE OF O'MELVENY & MYERS, LOS ANGELES, CALIF., AND WASHINGTON, D.C., A PANEL

Mr. THOMPSON. I did not understand you, sir.

Senator RANDOLPH. I said these productive workers past the age of 70, if they are doing the job, their age should not be the reason for their losing their employment.

Mr. THOMPSON. I understand that to be the purpose of the act, yes, sir.

Senator RANDOLPH. Is that your feeling?

Mr. THOMPSON. Not necessarily, sir.

Senator RANDOLPH. I had better stay, I guess. [Laughter.]

Senator NICKLES. You are certainly welcome to stay.

Mr. THOMPSON. I wish you would because I do not say that out of a sense of any prejudice or conviction or feeling against the aging. I say that because I think the act, in its present form, even with the proposed amendment, presents problems in industry which should be considered along with the proposal to eliminate this cap.

We have some very serious concerns that I want to express myself on that have nothing to do with any prejudice against aging or older people. We are all either old or hope to be, and we take that into account in what we say. But we do have some very serious concerns.

Senator RANDOLPH. I share, of course, your concern to do the job properly in whatever we do. But the subject matter should not be just left for another year and another year, should it?

Mr. THOMPSON. We have not advocated that, no, sir. We think it should be addressed, and we think it should be addressed head-on. We ourselves specifically requested these hearings. I went to see Senator Nickles myself and asked him to hold hearings so that we could be heard, because we are concerned over this entire subject.

Senator RANDOLPH. Thank you very much, Mr. Thompson.

Senator NICKLES. Thank you, Senator Randolph, for your input. Please proceed, Mr. Thompson.

Mr. THOMPSON. Thank you, Mr. Chairman and Senator Quayle. I am here representing the U.S. Chamber of Commerce. I am a Regional Vice Chairman of the Board of Directors of the U.S. Chamber of Commerce, and I am also the Chairman of the Chamber's Labor Relations Committee.

We have prepared a statement which we have submitted for the record, and it is a fairly lengthy statement and I will not attempt to read it today. If I may, I will summarize and will certainly be glad to answer any questions.

Senator NICKLES. Thank you.

Mr. THOMPSON. If I could deviate just for a moment, as I came into the room, a gentleman by the name of Frank Abrami stopped me and asked me if I was the chamber of commerce witness and I said I was, and he said that he was a gentleman who was 68 years old. And if you did not do something about this law, he was going to be forced to retire under a collective-bargaining agreement in a couple of years at age 70. He thought the chamber of commerce, plus his labor union, I think, were his main villains.

So, I asked him if he would have any objection if I put his statement into this record. And if I could have the permission of this subcommittee, I would like to just simply submit his statement, which accuses me of being a villain, but I think he ought to be heard, into this record.

Senator NICKLES. We will include his statement in the appropriate place in the record.

Mr. THOMPSON. Thank you, sir.

[The prepared statement of Mr. Abrami follows:]

Statement by Frank B. Abrami - Victim of Prejudice delivered at Senate Subcommittee Hearing on Abolition of Legalized - Age - Prejudice.

August 18, 1982

Washington DC

In 1964, The Civil-Rights Act for Minorities legislated morality into Employment-Practice. However one Minority was excluded, the Older-American, why?

For 18 years now, Congress continues to make excuses, make studies, have hearings - all of which are totally irrelevant....... totally irrelevant to the "Issue" The prejudice-issue is simplistic, rightfully so. It is the U.S. Chamber of Commerce, the Violator with the support of Congress.

versus

The Older-American, the victim of prejudice. Prejudice is the whole issue, that comes first. Therefore, I, for one, do not want to be hassled about jury-trials + punitive damages. I do not want to be distracted by Social-Security, the impact on young people or impact on the economy These are separate issues. Age-prejudice must be judged on its own merits or demerits. How come the other 5 Minorities are not hassled with these other issues The answer appears, obvious. Congress respects the other 5 minorities & not the Older-American. How else can we explain the shabby treatment we Older-Americans have received from Congress, for 18 years?

Additional Cosponsors of H.R. 6576, as of July 28, 1982

Mr. ADDABBO
Mr. ANNUNZIO
Mr. BARNES
Mr. CHAPPELL
Mr. COELHO
Mrs. COLLINS of Illinois
Mr. CONTE
Mr. COURTER
Mr. DANIEL B. CRANE
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Mr. DORGAN
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Mr. GORE
Mr. HAGEDORN
Mr. HAMMERSCHMIDT
Mr. HARTNETT
Mr. HENDON
Mr. HEFTEL
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Mr. JEFFORDS
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Mr. OBERSTAR
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Mr. RATCHFORD
Mr. ROBERTS of South Dakota
Mr. SAVAGE
Mr. SCHUMER
Mr. SHAMANSKY
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Mr. SKELTON
Mrs. SMITH of Nebraska
Mr. SOLOMON
Mr. STARK
Mr. STENHOLM
Mr. STOKES
Mr. STUDDS
Mr. SUNIA
Mr. WAXMAN
Mr. WILLIAMS of Montana
Mr. WILLIAMS of South Dakota
Mr. WOLF

List still growing!
It is now
180 Congressman
24 Senators

This is the social-issue whose time came in 1964 when the Older-American was discriminated against by the Civil-Rights Act of 1964

3915 Clarke - Seaford - 11783.
Spring of 1982.
Nancy Reagan, First-Lady
The White House Washington, D.C.
Dear Nancy Reagan,

It had always been my understanding, that the Famous 1964 Civil Rights Act, Public Law 92-261 protected the civil rights of all American Citizens.

To my dismay, I have just been told that having reached 70, I, as an American-Citizen, no longer qualify for protection.

It is now my understanding that inorder for me to qualify for protection an Amendment to Section 703 of the Civil Rights Act has to happen. This amendment would simply "include" one word, a word previously "excluded" in the 1964 Act......Age.

As First-Lady,
Your help could make all the difference whether, I or Prejudice, wins.

Cordially,
Frank B. Abrami

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

* [Public Law 92-261]

* DISCRIMINATION BECAUSE OF age RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[Public Law 92-261]

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership or applicants for membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[Public Law 92-261]

[Whereupon, Senator Quayle assumed the Chair.]

Mr. THOMPSON. I am honored to appear before the subcommittee today to express opposition to lifting the age 70 cap in the Age Discrimination in Employment Act, and to support certain reforms of that law to make it more effective and equitable.

In the interests of time, I will summarize our written statement and request that it be put in the record.

The Chamber of Commerce of the United States is the largest federation of business and professional organizations in the world, and we consider ourselves the principal spokesman for the American business community.

The chamber recognizes the important contributions which older workers are making and can make to our Nation's productive effort. Consistent with that recognition, we urge our members to lend their support to the fullest extent possible in providing satisfactory placement of older workers in suitable self-sustaining employment.

Nevertheless, we also believe that preserving the age 70 cap in ADEA is wise public policy. It focuses national attention where it should be—on providing adequate retirement income for all workers at a specified age so that the retirement years can be enjoyed.

I think we lose sight of the fact that with some permissible mandatory retirement age, employers are encouraged to provide retirement programs and to make provision for the retirement of workers as they become older.

Furthermore, we believe lifting the cap would upset long-term collective-bargaining agreements, would disrupt sound employment practices, would curtail management flexibility, and would reduce employment opportunities for women and minorities. Indeed, lifting the age 70 cap represents a broad leap into the unknown with little, if any, analysis of the implications to the economy, the impacts on older workers, and human resources planning for companies.

In addition to the policy considerations which argue in favor of maintaining the age 70 cap, it is important to note that employers are experiencing increasing problems in attempting to comply with the provisions of ADEA. These compliance difficulties and the delays in justice, which inevitably result, lead us to support reforms of ADEA to make the law more equitable and more efficient to administer.

Thus, there are several key reforms of ADEA which we believe must be addressed and enacted before the Congress considers the age 70 cap. These reforms are: broadening the exemption for policymaking executives; conforming ADEA remedies to those of other Federal discrimination laws; codifying the current regulatory exemption for bonafide employee benefit plans; and preempting State age discrimination laws which now may exist.

We take special notice of S. 2844, the Age Discrimination in Employment Amendments of 1982, introduced by Senator Quayle on August 16. In particular, Senator Quayle's bill eliminates the jury trial and liquidated damage provisions of ADEA and replaces them with equitable relief provisions as found in other antidiscrimination statutes—a change we strongly support.

In conclusion, the elimination of mandatory retirement is not as simple a matter as proponents would have Congress believe. It would result in a fundamental change in the employment practices of all covered employers regarding the hiring, routine evaluation and promotion of employees, and would reduce the number of hiring and promotional opportunities available in the private sector.

Of particular concern is the apparent unwillingness of the administration and the legislation's proponents to confront the administrative problems that would result in the elimination of mandatory retirement. Employer experience with the act since passage of the 1978 amendments demonstrates that ADEA in its present form is neither fair nor equitable. Its procedures place such a heavy burden of proof on employers that it is extremely difficult, if not impossible, for them to rebut claims of age discrimination at the trial level.

Because the advantage is clearly with plaintiffs, most employers faced with an age claim are forced to try to buy their way out of the problem, no matter how meritless the charge. The act should be used to protect those who have been victimized by unlawful age discrimination. It should not be used as a device to shake down innocent employers.

There has been some discussion that Congress should refrain from considering the act's administrative problems at the same time that it considers broadening its coverage. For Congress to act in such a manner, however, would only exacerbate the problems that already exist. Unless management's concerns are taken up when Congress addresses the mandatory retirement issue, they will never be taken up.

The economic condition of our Nation's businesses makes it abundantly clear that Congress at this time should approach cautiously any proposal to impose additional requirements and liabilities on employers, particularly if those requirements are incapable of being fairly administered.

Thank you, sir.

[The prepared statement of Mr. Thompson follows:]

STATEMENT
on
THE AGE DISCRIMINATION IN EMPLOYMENT ACT
Lifting The Age 70 Cap
(S.2617)
before the
SUBCOMMITTEE ON LABOR
of the
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Robert T. Thompson
August 18, 1982

I am Robert T. Thompson, senior partner in the law firm of Thompson, Mann and Hutson of Greenville, South Carolina and Washington, D.C. I am also Regional Vice Chairman of the Board of Directors of the U.S. Chamber of Commerce and serve as Chairman of the Chamber's Labor Relations Committee. With me today are G. John Tysse, Director of Labor Law for the Chamber and Christopher Luis, a labor law attorney at the Chamber.

We are here to express opposition to S.2617 - a bill that would lift the age 70 cap in the Age Discrimination in Employment Act of 1967 (ADEA).

The Chamber of Commerce of the United States is the largest federation of business and professional organizations in the world, and is the principal spokesman for the American business community. The U.S. Chamber represents more than 255,000 members, of which more than 250,000 are business firms, more than 2,800 are state and local chambers of commerce, and more than 1,300 are trade and professional associations.

More than 85 percent of the Chamber's members are small business firms having fewer than 100 employees, yet virtually all of the nation's largest industrial and business concerns are also active members. We are particularly cognizant of the problems of smaller business, as well as issues facing the business community at-large. A significant number of our members are covered by ADEA.

Besides representing a cross-section of the American business community in terms of number of employees, the U.S. Chamber also represents a wide management spectrum by type of business and location. Major classifications of American businesses -- manufacturing, retailing, services, construction, wholesaling, and finance -- all have more than 15,000 businesses represented as members of the U.S. Chamber. Yet no one group represents as much as 23 percent of the total Chamber membership. Further, the Chamber has substantial membership in all 50 states.

BACKGROUND

ADEA prohibits employers with 20 or more employees from refusing to hire, discharging, denying employment opportunities or promotions, or otherwise discriminating against employees aged 40 to 70. ADEA applies to any employment practice including compensation, terms, conditions, or privileges of employment.

ADEA is a hybrid reflecting the influences of both Title VII of the 1964 Civil Rights Act (Title VII) and the Fair Labor Standards Act (FLSA). The objectives of ADEA, elimination of discrimination from the workplace, and the employment practices which are prohibited, parallel those of Title VII. However, the enforcement mechanism of ADEA is modelled after FLSA.

Congress passed the ADEA in 1967, and although tailored after Title VII, there was general concern that including age discrimination under Title VII would "overload" the Equal Employment Opportunity Commission (EEOC) since it was a relatively new agency. Enforcement authority was therefore given to the Secretary of Labor (DOL).

Coverage of ADEA applied to workers between the ages of 40 and 65. In 1978 Congress lifted the age cap from 65 to 70.[1/] It also overturned a Supreme Court decision which allowed companies to force retirement before expiration of the cap if done in compliance with a nondiscriminatory pension plan, and enacted a provision explicitly authorizing jury trials.

The 1978 Amendments also instructed DOL to complete a study on the effects of the 1978 Amendments and on the possible effects of lifting the age

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[1/] The cap represents the upper age level under ADEA. It means that employers cannot discriminate or force retirement on employees below that age limit. Contrary to popular belief, it is not a mandatory retirement limit by which employees are forced to retire at a certain age.

cap. In 1979, based on a reorganization plan issued by President Carter, enforcement of ADEA was shifted to the EEOC.[2]

Although the law was enacted in 1967, it has been only within the last several years that it has received marked attention by both the plaintiff community concerned with enforcing its rights and with the business community in terms of its compliance burden.

Before addressing some of the issues related to ADEA, we will comment briefly on the role of older workers.

OLDER WORKERS

During the past generation this country has undergone a retirement revolution. It used to be that many workers would labor at their jobs until ill health or perhaps death intervened. Today, it appears that workers are retiring earlier than before with an average retirement age of under 65 and perhaps as low as 62.

One of the most influential events in bringing about this change was passage of the Social Security Act. This Act provided a new source of retirement income, thereby easing the necessity to work for the bulk of the nation's elderly workforce. The Social Security System also established retirement as an expected occurrence, with retirement by age 65 being generally accepted as a "normal" retirement age.

Then, during World War II, wage and salary controls and a corporate excess profits tax[3] made private pension benefits an advantageous alternative to restricted pay increases. This alternative pay or fringe benefit was kept and expanded by many companies so that a sizeable segment of the working population received social security plus private pension benefits. This combination made early retirement more attractive to many and economically possible to many more. More recently, self-employed pensions (Keough plans) and Individual Retirements Accounts (IRA's) have further stimulated retirement savings during an individual's working lifetime.

2/ Reorganization Plan No. 1 of 1978, 43 Federal Register, 19807 (1978).

3/ Patrick J. Davey, Financial Management of Company Pension Plans, The Conference Board Report #611, 1973, pp. 5-6.

In addition, the general health of the population has increased over the past generation permitting better health throughout a lifetime of work.[4/]

Many jobs have become less physically demanding and life spans have also increased. Thus, even though Americans are living longer, more workers are choosing to retire earlier. Today, only 47 percent of the male population aged 55 or older is in the labor force compared to 61 percent in 1960.[5/]

This trend is relevant when analyzing the reasons offered for lifting the age 70 cap in ADEA. Proponents suggest that lifting the cap would increase the nation's productivity, would allow for more labor to meet the nation's economic needs, would enhance the well being of older persons, and perhaps most significantly would reduce social security costs.

Most studies suggest that income and health are the two most important considerations for the elderly, and that they are the reasons why people retire early.[6/] Poor health promotes early retirement, while adequate income and good health also promote early retirement. Thus it appears the primary motivation for working beyond normal retirement age is because of financial necessity. Furthermore, a DOL study estimates that by 1990, only 195,000 male workers would be added to the workforce -- almost half between the ages of 68 and 70 -- as a result of lifting the age 70 cap.[7/]

Based on current trends, policy makers must not deceive themselves or the public that lifting the age 70 cap would increase older workers' participation to the point of rectifying the social security system's financial crisis.

[4/] For instance, the mortality rate per 1,000 in the population dropped dramatically from the early part of the century.

	Men	Women
1919	28.7/1000	23.7/1000
1978	18.8/1000	9.9/1000

Source: America's Aging Population, The Conference Board Report #785, p. 9 (1980).

[5/] Ibid., p. 17.

[6/] Ibid., p. 50-51.

[7/] Interim Report, DOL Study on The Effects of Raising the Age Limit in the Age Discrimination in Employment Act, January 1981.

Business Contributions to Retirement

The business community has provided substantial assistance to its older workers and to its retired employees. Although a complete business survey is not available, a sufficient sampling can provide a good picture on business' contribution to meaningful retirement.

First and foremost are financial benefits. Approximately half of the workforce is covered by some type of employer's pension/welfare fund available upon retirement. Besides annuities, these benefits typically include medical benefits and group life insurance. In addition, a host of other benefits are provided by employers to older workers or retirees including:

- Pre-retirement and post-retirement counseling on issues ranging from health care and finances to legal matters and hobbies.
- Flexible work hours which allow older workers to tune their schedules with work.
- Gradual retirement which allows older workers to phase in their retirement.
- Tuition aid plan assistance, which allows for greater use of leisure time or to develop the skills for a second career choice.
- Retiree publications either geared exclusively to company retirees or to retirees in general.
- Group travel tours.
- Employee discounts on company items and retirees clubs which provide a wide variety of recreational and cultural activities.
- Reunions such as clam bakes, dinners, luncheons, golf tournaments or similar affairs which allow the retirees an opportunity for renewing old acquaintances.

In addition, many companies afford older workers an opportunity to work and apply their invaluable experience as consultants, or long range strategic planners, or on the boards and staffs for community, civic or professional associations such as local chambers of commerce.

In general, business views older workers and retirees as an invaluable component of the company, the community and the nation.

A MANDATORY RETIREMENT OPTION IS WISE PUBLIC POLICY

Despite all the horror stories by proponents of lifting the age 70 cap, most workers are not faced with an arbitrary removal from employment. As we showed earlier, the current trend with the workforce is to voluntarily retire earlier.

Mandatory retirement suffers from bad press or misunderstanding. Opposition to mandatory retirements seems to be greatest among those furthest from retirement. A recent survey found that while 75% of those under age 25 oppose mandatory retirement, only a bare majority of those 65 and older share this position.[8/]

A survey of readers in Retirement Living magazine showed that 55% of the respondents who were already retired said that a law permitting retirements at a fixed age would be "desirable for most people."[9/]

This essentially parallels the Chamber's position opposing the lifting of the age 70 cap. Namely, it is the wisest course for the nation to establish a reasonable retirement age while attempting to provide adequate retirement income for all workers at that particular age. A fixed retirement age would constantly remind business and workers of the inevitability of retirement and the advisability of planning for it.

Thus although the age 70 cap in ADEA does not mandate retirement, it seems to be a logical focal point for planning. It is already five years beyond age 65 when full Social Security benefits are payable.

It is also important to note that the final results on raising the limit from age 65 to 70 are not in yet. The disruptions caused by the 1978 Amendments to ADEA are just being worked out. Clearly, more study is needed

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[8/] Special Consumer Survey Report, The Conference Board Report, November, 1977.

[9/] What's the Right Age for Retirement? How You Voted in Our Reader's Poll, Retirement Living, April, 1977.

and more analysis of the potential adverse effects should be provided before new legislation is enacted. And there are additional reasons for maintaining the age 70 cap:

- Long term collective bargaining agreements would be upset and would have to be reopened and renegotiated to provide for the necessary adjustments if the age 70 cap is removed.
- Sound employment practices would also be disrupted. It is not uncommon for management to retain for several years older workers who should or could be dismissed for cause. Without a set retirement date, management would have to alter its policies and begin performance evaluations and dismissals of some workers who would otherwise be retained to retirement. The shock of being dismissed for cause would be far worse than being retired according to a plan.
- Lifting the age 70 cap would also remove flexibility from managing and would reduce job opportunities. Corporate management is viewed as being predominantly white and male. To the extent that restraints are put on retiring managers and supervisory personnel, opportunities for bringing in females and minorities would be restricted. This is particularly true today when many companies are being forced to cut back workforces.

Indeed, lifting the age 70 cap represents a broad leap into the unknown with little, if any, study of the implications to the economy, the impacts on older workers, and human resources planning for companies.

DIFFICULTIES OF ADEA COMPLIANCE

In addition to the policy considerations which argue against lifting ADEA's age 70 cap, the law has created practical problems in its implementation which need to be fully addressed before any changes are made.

Compliance with the requirements of ADEA has been difficult for business. For example, a major auto manufacturer recently had to undergo substantial reductions in its workforce (RIF) as a result of economic ill health. The company selected a certain number of operations for RIFs and decided that rather than just lay off longtime employees, it would provide them with an opportunity to retire and provide pension benefits.

A U.S. District court found that job elimination or RIFs are not a factor which renders an otherwise "illegal voluntary retirement" lawful. Thus, under this holding, the company is now faced with the option of laying off an employee and providing no benefits or laying off an employee, providing pension benefits and possibly being sued under ADEA. The ADEA, in this case, forces bad personnel practices.[10]

In another case, an employer dismissed an employee within the protected age group and hired another employee, 10 years the senior of the dismissed employee. Yet this was insufficient proof by itself to rebut a case of age discrimination under ADEA.[11]

Some of our members have told us that, because of the confines of ADEA, they are being forced to lay off minority and women employees. This weakens their overall effectiveness as affirmative action employers. These problems result when, faced with a reduction in force, employers cannot retire older workers with benefits, but must lay off those most recently hired.[12] Employers in this situation face potential lawsuits under either Title VII or ADEA, with no clear guidance as to the legal course of action.

Business also faces uncertainty regarding ADEA compliance on the question of pension and benefit accruals beyond normal retirement age and the conflicting requirements of certain state laws which go beyond the Federal law.

Given the compliance problems employers have had with ADEA, we believe lifting the age 70 cap at this time would only result in more confusion and inequity.

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[10] EEOC v. Chrysler Corporation, reported in BNA Daily Labor Report, 7/6/82, p. A-1.

[11] Smith v. World Book Childcraft Internationl, Inc. (D.C., Ill., 1980), 24 FEP Cases 771.

[12] See Last Hired, First Fired: Layoffs and Civil Rights. A Report of the United States Commission on Civil Rights, February, 1977).

ADEA REFORMS ARE NEEDED

While opposed to lifting the age 70 cap, we do support reforms of ADEA to make the law more equitable and more efficient to administer. Thus, there are several key reforms of ADEA which we believe must be addressed and enacted before the Congress moves to lift the Age 70 cap. These reforms are:

- broadening the exemption for policy-making executives;
- eliminating jury trials and liquidated damages;
- codifying the current regulatory exemption for "bona fide employee benefit plans"; and
- preempting state age discrimination laws.

Broadening the Exemption for Policy-Making Executives

The "executive" exemption, section 12(c)(1), provides for an exemption from coverage for workers age 65 and over, if for two years immediately before retirement they are in a bona fide executive or high policy-making position and are entitled to a guaranteed annual pension of at least $27,000. It was placed in ADEA for equitable reasons. The need for promotional opportunities at top levels is vital for the surival and growth of a business and for recruitment of qualified personnel. However, we believe the current exemption in the ADEA is inadequate and subject to various interpretations which can be resolved only through costly litigation. A more clear-cut definition would be better.

For example, many companies would like to use the exemption but have not because of the uncertainty as to who is a policy making executive. The burden is on the employer to prove that a high policy-making executive has met the tests set out by Congress. These employers want to avoid the possibility of expensive litigation.

We foresee this area as being one subject to increased future litigation to determine the boundaries of the exemption. We recommend that a clear-cut test based soley on pension benefits be used to determine the definition of a high policy-making executive.

Eliminate the Provisions for Jury Trial and Liquidated Damages

These two provisions do not enhance employment opportunities for the elderly. They tie up the courts with complicated cases, and they do not comport with other Federal civil rights protections. Liquidated damages encourages litigation and discourages informal resolution of lawsuits. By conforming ADEA remedies to Title VII remedies, consistency and fairness in Federal employment discrimination laws would be established.

When the Congress enacted Title VII, it intended to have a mechanism by which enforcement of the law could be achieved with a minimum of litigation. To a large extent this scheme has succeeded.

The two nonconforming provisions of ADEA -- jury trials and liquidated damages -- have the opposite effect. A comparison of the enforcement experience of Title VII and ADEA proves our point.

One of the most significant factors to determine effectiveness in the compliance area is the settlement rate concerning charges filed. Yet the settlement rate within the EEOC for ADEA in fiscal year 1981 cases is barely half that for Title VII:

Title VII	43% settlement rate
ADEA	23% settlement rate.

Similarly, considerably fewer people have received benefits in 1981 under ADEA than under Title VII:

Title VII	47,447 charges filed	33,523 receiving benefits (70.6%)
ADEA	9,550 charges filed	2,930 receiving benefits (30.6%)

The same pattern holds true for cases litigated by the EEOC under Title VII and ADEA. A comparison of the settlement rates from FY 1980 to FY 1981 shows:

	FY 1980	FY 1981	% Change
Title VII	141	171	+22%
ADEA	42	22	-48%

These settlements should be compared to the number of cases actually filed by the EEOC:

	FY 1980	FY 1981	% Change
Title VII	200	229	+15%
ADEA	47	89	+89%

These figures show that, although the number of cases filed under ADEA is increasing at a much faster rate than Title VII actions, the percentage settled is decreasing. We believe this is an alarming trend which will lead to further disruptions not only with the effective operations of the EEOC but with increasing compliance burdens on business and delays in justice. This situation helps no one.

We submit that the reasons for these trends are that jury trials and liquidated damages -- which foster litigation -- are available under ADEA while not available under Title VII.

The complexities of legal and factual issues under discriminatiion cases are persuasive reasons to require trial by the court -- as in Title VII actions -- rather than a jury. This principle has been recognized in other legal areas, particularly antitrust.

It is easy to see how, in a case where someone with 20 or 30 years of experience with a company is laid off or fired, the sympathies of a jury would most likely be with the plaintiff, even where the employer has established a non-discriminatory reason for the action. Likewise, it is not surprising that judges and Courts of Appeal have overturned, or granted judgment notwithstanding the verdict, in a large number of ADEA cases.[13/]

[13/] Lovelace v. Sherwin Williams, No. 80-1879 (4th Cir., June 15, 1982), reprinted in 134 D.L.R. D-1 (July 13, 1982); Pacinski v. Outlet Co., 28 EPD ¶ 32,483 (2nd Cir. 1982), $187,000 award; Coburn v. Pan American World Airways, Inc., (Vol. 81-1086 D.D.C., May 7, 1982); Stanojev v. Ebasco Services, Inc., 643 F.2d 914 (2nd Cir. 1981), $800,000 award; Morelock v. NCR Corp., 586 F2d 1096 (6th Cir., 1978), cert denied 441 U.S. 906 (1979); McGregor v. CCH Computax, Inc., 18 EPD ¶ 8919 (D. Cal. 1979); Smith v Flax, 618 F2d 1062 (4th Cir., 1980); Hedrick v. Hercules, Inc., 658 F2d 1088 (5th Cir. 1981).

The liquidated damages requirement is also a key factor in encouraging litigation since the possibility of a huge money award makes taking a case to trial much more attractive. This "double backpay" award is also not contained in any other federal discrimination statute.

Other equitable remedies tracking the scheme under Title VII would be more appropriate in actions under the ADEA. We recommend both as a matter of equity and of proper administration and uniformity in federal discrimination cases, that jury trials and liquidated damages be eliminated from ADEA.

Codify the Current Regulatory Exemption for "Bona Fide Employee Benefit Plans"

Section 4(f)(2) of the ADEA provides an exemption from coverage for benefit plans which meet the following requirements:

- The plan and it provisions must be bona fide.
- The personnel action taken must be in observance of the terms of that plan.
- The particular terms of the plan must not be a "subterfuge to evade the purposes" of the ADEA.

In May, 1979, the DOL, which at the time had jurisdiction over enforcement of the ADEA, issued a final Interpretative Bulletin (I.B.) concerning the effect of the 1978 Amendments on employee benefits plans.[14/]

One of the more significant features of the I.B. is that an employer does not violate the ADEA when it reduces benefits for employees over 65 if such reductions can be justified on the basis of "actuarially significant cost considerations." Moreover, with regard to welfare plans, employers may eliminate contributions and accruals for older workers under certain circumstances which are not tied directly to "actuarially significant cost considerations." For instance, if Medicare would cover a certain medical expense, the employer can eliminate coverage for that type of expense.

This interpretation is fully consistent with the legislative history of ADEA. On July 25, 1977, the House Committee on Education and Labor submitted its Report[15/] on ADEA admendments and gave assurances that no additional

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[14/] 29 C.F.R. 860.120.

[15/] House Report #95-527, Part I. of 95th Congress, 1st Session -- p. 9.

benefit accruals or actuarial adjustments would have to be made, other than those required by ERISA, by lifting the cap from 65 to 70. On October 12, 1977, the Senate submitted its report on the ADEA Amendments which concurred with the House Report.

The legislative history and the DOL I.B. have proven to be exceedingly helpful in easing compliance by business with an aspect of the 1978 amendments which could have been costly and disruptive to employee benefit arrangements. Despite their salutary effect, they do not offer certainty since the I.B. is not incorporated in the ADEA.

Indeed, the EEOC has given notice that it will reconsider all aspects of ADEA and has indicated that a new I.B. with modifications will be issued in the future.[16]

We strongly recommend that the existing policy within the I.B. be codified into law.

Prempt State Age Discrimination Laws

A national age discrimination policy, whatever it be, should not be subject to differing standards, varying state to state. It must provide for uniformity in administering age discrimination cases. This practice also creates greater efficiency and fairness.

Many states have their own age discrimination laws with standards differing from the Federal ADEA. In California, for instance, there is no exemption for policy-making executives and no age cap.

Furthermore, states are not subject to the I.B. on employee benefits. Thus, they could arguably require pension accural after age 65 if they so chose. To complicate matters, ERISA requires that an employer's plan be the same for all employees. Thus a multi-state company may be subject to violation of a state ADEA law or have to restructure its pension benefits on a national basis to conform to a particular state law.

16/ 46 Federal Register, 47726 (September 29, 1981).

Although there is strong support that Federal preemption under ERISA would control, the possibility for litigation and for disruption are great. Federal preemption would solve this problem, and make preemption for ADEA consistent with existing preemptions under ERISA and the National Labor Relations Act.

S. 2844 - The Age Discrimination in Employment Amendments of 1982

Pertinent to the subject of ADEA reform, we note that Senator Dan Quayle, a member of the full Labor and Human Resources Committee, introduced a bill this past Monday which would accomplish many of the reforms we support. In particular, Senator Quayle's bill recognizes the need to conform ADEA's compliance scheme to that of Title VII.

CONCLUSION

The elimination of mandatory retirement is not as simple a matter as proponents would have Congress believe. It would result in fundamental changes in the employment practices of all covered employers regarding the hiring, routine evaluation,and promotion of employees and would reduce the number of hiring and promotional opportunities available in the private sector.

Of particuar concern is the apparent unwillingness of the Administration and the legislation's proponents to confront the administrative problems that would result in the elimination of mandatory retirement. Employer experience with the Act since passage of the 1978 amendments demonstrates that ADEA in its present form is neither fair nor equitable. Its procedures place such a heavy burden of proof on employers that it is extremely difficult for them to rebut claims of age discrimination at the trial level.

Because the advantage is clearly with plaintiffs, most employers faced with an age claim are forced to try to buy their way out of the problem no matter how meritless the charge. The Act should be used to protect those who have been victimized by unlawful age discrimination; it should not be used as a device to shake down innocent employers.

There has been some discussion that Congress should refrain from considering the Act's administrative problems at the same time that it considers broadening its coverage. For Congress to act in such a manner, however, would only exacerbate the problems that already exist. Unless management's concerns are taken up when Congeess addresses the mandatory retirement issue, they will not be taken up at all.

The economic condition of our nation's businesses make it abundantly clear that Congress at this time should approach cautiously any proposal to impose additional requirements and liabilities on employers, particularly if those requirements are incapable of being fairly administered.

We urge that Congress enact the reforms we recommend and that S.2617 not be enacted.

Senator QUAYLE. Thank you very much. Let me just go ahead and ask the other two witnesses to give their testimony. Mr. Braithwaite.

Mr. BRAITHWAITE. Senator, we appreciate this opportunity to appear before you to discuss S. 2617. My name is David Braithwaite. I am director of corporate employment of United States Steel. I am appearing today as vice chairman of the Human Resources and Equal Employment Policy Committee of the National Association of Manufacturers. With me is Ms. Brenda McChriston Brooks, director of Human Resources and Equal Opportunity at NAM.

At the outset, let me state that NAM and its member companies support fully the concept of fair and equal employment opportunities and practices for older Americans. NAM policy states that employment decisions are to be based on individual performance and qualifications, not age. Older workers are making substantial contributions to the work force.

Clearly, there is no justification for arbitrary restrictions on employment opportunities for older Americans. However, it is highly questionable whether the present law, with its general prohibition against mandatory retirement prior to age 70 and with a specific exemption for executive retirement at age 65, imposes any such artificial restriction.

It should be recognized that the present law creates, in some ways, a system of checks and balances which could be disturbed by prohibition of mandatory retirement in general, even though the executive exemption is retained. The current law makes it perhaps unduly easy for an employer to terminate an employee after age 70, while making it far too difficult for an employer to terminate, for just cause, an employee prior to age 70.

There are three areas in the present law which unfairly penalize an employer who, acting in good faith and with just cause, terminates, demotes or reassigns an employee between the ages of 40 and 70.

I would note that challenges of reassignment or failure to promote are numerous, and I believe are not the intent of the legislation.

Turning to the need for modifications, first, provisions should be made for Federal preemption. The multiplicity and variations in State statutes make consistency extremely difficult for major national employers. Investigations and lawsuits over the same set of facts within two forums—agencies and courts—is costly and, we would submit, unnecessary.

Jury trials provided under the present statute are not providing equitable results. Most companies are of the opinion that a judgment for or against the plaintiff should be based upon a reasoned, dispassionate view of whether a violation was committed under the law as written.

Company experience with jury trials amply demonstrates that too often, such judgments are based on a jury's emotional response to a plaintiff's situation. Experience has shown that it is very difficult for a jury to confine its deliberations to the issue of whether age was a factor or the reason for the employer's action, as evidenced by the large number of jury decisions that have been reversed on appeal.

We have attached to our written statement examples of a number of such cases. I urge you to review them and will only cite one here; that is the case of *Stanojev* v. *Ebasco Services, Inc.,* in which a jury returned a verdict for the plaintiff, awarding $800,000 in damages.

On appeal, the employer claimed that there was insufficient evidence to support the verdict, as well as passion and prejudice on the part of the jury. The second circuit agreed, and reversed the lower court holding that the plaintiff had not even established a prima facie case of discrimination. The court emphasized that the plaintiff's circumstantial evidence, and I quote, "failed to show any conduct on the part of Ebasco which could be logically linked to a finding that he was dismissed because of his age.

"We believe that this is so clear that reasonable minds could not differ, and that the defendant's motion for a directed verdict should have been granted." This is not an isolated case, as our attachment will show you.

Senator **Quayle**. Mr. Braithwaite, I apologize; I am going to have to interrupt you and recess this committee for a few moments. We have a vote on the floor. Senator Nickles is on his way over there to vote now and will be returning shortly. If I do not leave within the next 30 seconds, I am going to miss that.

So, I apologize, but I will have to recess the committee and go over and vote, and we will return as soon as possible. Thank you.

Mr. **Braithwaite**. Thank you, Senator.

[Whereupon, a brief recess was taken.]

[Whereupon, Senator Nickles resumed the Chair.]

Senator **Nickles**. I apologize to those individuals who were inconvenienced.

Mr. Braithwaite, would you—how do you pronounce that?

Mr. **Braithwaite**. Braithwaite, Senator.

Senator **Nickles**. If you would please continue.

Mr. **Braithwaite**. I was addressing the issue of jury trials, Senator, and I will pick up at that point if I may.

Senator **Nickles**. Thank you.

Mr. **Braithwaite**. We submit that the complex legal and factual issues involved in ADEA litigation are more appropriate——

Senator **Nickles**. Could you withhold just for a moment? We would appreciate silence for our guests—I realize it is hectic with the votes and running back and forth—so everyone can be heard.

Please proceed.

Mr. **Braithwaite**. We submit that the complex legal and factual issues involved in ADEA litigation are more appropriate for judicial decision. Also, the right of a jury trial does little, if anything, to promote the effective employment of older people. Jury trials simply provide windfall benefits to those who choose to bring suit.

Finally, there should be greater consistency in the enforcement of the civil rights laws. Claims of age discrimination are afforded the opportunity of a jury trial. That is not the case for a cause of action arising under race, sex, national origin or religion. The rights of one protected group in this society should be no less or no greater than those of others.

This latter comment is also applicable to the third major area of abuse—liquidated damages available under ADEA but not available in title VII cases. While such damages are only available where the employer's conduct is found to be willful, the standard of willfulness is so low under present court interpretation that liquidated damages are routinely awarded in ADEA litigation.

Many companies have found that the availability of this windfall has discouraged plaintiffs from settling out of court, hindering the informal resolution of such suits. Where a violation of the act is found, make-whole relief is adequate.

We submit that a mandatory retirement age is equitable. The removal of mandatory retirement would impact adversely on human resources planning, as it would become increasingly difficult to determine when job vacancies would occur. Planning for the replacement of key staff personnel is essential. A prohibition against mandatory retirement could result in inefficient management.

For employees, a fixed date encourages those nearing retirement to plan. Employees requested to retire unexpectedly may not have sufficient time to plan, and thus may experience difficulty in adjusting to retirement.

In summary, it is recommended that the current ADEA, as amended in 1978, be retained as is. Failing that, it is recommended that the entire issue be reviewed and studied in greater detail before any legislative action is taken. The final report of the National Commission on Social Security Reform is due out at the end of the year. The commission is considering possible long-range changes in the social security system. Any such reforms will impact the entire retirement system.

We recommend postponement of any legislative action which would have far-reaching implications for retirement until the final report of the commission is released and a careful study is made of it and the needed reforms in the present legislation.

Thank you.

[The prepared statement of Mr. Braithwaite follows:]

TESTIMONY OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS

before the

SENATE SUBCOMMITTEE ON LABOR

on

S. 2617 ELIMINATION OF MANDATORY RETIREMENT

DAVID BRAITHWAITE
DIRECTOR, CORPORATE EMPLOYMENT
U.S. STEEL

August 18, 1982

Honorable Members of the Committee:

We appreciate this opportunity to appear before you to discuss S. 2617 - a bill to amend the Age Discrimination in Employment Act of 1967 by eliminating mandatory retirement and other forms of age discrimination in employment.

My name is David Braithwaite, and I am Director of Corporate Employment of U. S. Steel. I am appearing today as vice chairman of the Human Resources and Equal Opportunity Policy Committee of the National Association of Manufacturers. With me is Ms. Brenda McChriston Brooks, Director, Human Resources and Equal Opportunity.

At the outset, let me state that NAM and its member companies support fully the concept of fair and equal employment opportunities and practices for older Americans. NAM policy states that employment decisions are to be based on individual performance and qualifications, not age. Older workers are making substantial contributions in the workforce. However, there is a need for a structure to deal with the delicate issue of retirement. The present law, provides for mandatory retirement at age 70, with the exception of certain executives required to retire at age 65. To simply remove these requirements will impose additional, and we feel unwarranted, burdens on the business community.

Experience to date with ADEA reflects the need for several modifications;

First, provision should be made for federal pre-emption.

The multiplicity and variations in state statutes make consistency extremely difficult for major national employers. Investigations and law suits over the same set of facts within a case in two forums, agencies and courts, is costly and unnecessary.

Second, jury trials, provided under the present statute are not providing equitable results. Most companies are of the opinion that a judgment for or against the plaintiff should be based upon a reasoned, dispassionate view of whether a violation was committed under the law as written. Company experience with jury trials amply demonstrates that too often such judgments are based on a jury's emotional response to a plaintiff's situation. Experience has shown that it is very difficult for a jury to confine its deliberations to the issue of whether age was the reason for the employer's action, as evidenced by the large number of jury decisions that have been reversed on appeal. Accordingly, the complex legal and factual issues involved in ADEA litigation are more appropriate for judicial decision. Also, the right to a jury trial does little, if anything, to promote the effective employment of older people. Jury trials simply provide windfall benefits to those who choose to bring suit. Finally, there should be greater consistency in the enforcement of the civil rights laws. Claims of age discrimination are afforded the opportunity of a jury trial. That is not the case for a cause of action arising under race, sex, national origin or religion. The rights of one protected group should be no less or no greater than those of another.

This later comment is also applicable to liquidated damages, available under ADEA but not available in Title VII cases. Further, while such damages are only available where the employer's conduct is found to be willful, the standard of willfulness is so low under present court interpretation that liquidated damages are routinely awarded in ADEA litigation. Many companies have found that the availability of this windfall has discouraged plaintiffs from settling out of court, hindering the informal resolution of such suits. Finally, under no circumstances should a provision providing for compensatory damages for pain and suffering be added to this statute; make-whole relief is adequate.

We submit that a mandatory retirement age is equitable. The removal of mandatory retirement would impact adversely on human resources planning as it would become increasingly difficult to determine when job vacancies would occur. Planning for the replacement of key staff personnel is essential. A prohibition against mandatory retirement could result in inefficient management and declining productivity. For employees, a fixed date encourages those nearing retirement to plan accordingly. Employees requested to retire unexpectedly may not have sufficient time to plan and thus may experience difficulty in adjusting to retirement.

In summary, it is recommended that the current ADEA as amended in 1978 be retained as is. Failing that, it is recommended that the entire issue be reviewed and studied in greater detail before any legislative action is taken. The final report of the National Commission on Social Security Reform is due at the end of the year. The commission is considering possIble long range changes in the social security system. Any such reforms will impact the entire retirement system. We recommend postponement of any legislative action which would have far-reaching implications for retirement until the final report of the Commission is released, and a careful study is made of the needed reforms.

Thank you. I shall be happy to respond to any questions members of the Committee may have.

ATTACHMENT

EXAMPLES OF LARGE JURY AWARDS

1. Cancellier v. Federated Department Stores, 28 FEP Cases 1151 (9th Cir. 1982): The Court of Appeals for the Ninth Circuit refused to overturn a jury verdict in the district court in which three former employees were awarded $1,900,000, including liquidated damages under the ADEA and damages for pendent state claims. The court indicated that "[t]he amounts awarded here are consistent with a reasonable award on the ADEA and pendent state claims."

2. Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981): The plaintiff alleged that the company discriminated against him on the basis of age when he was not promoted to vice-president and when he was transferred to a facility outside the United States. After a jury trial, the jury awarded him $452,400 in compensatory and liquidated damages. The Court of Appeals for the Second Circuit affirmed the award.

3. Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981), cert. denied, 102 S. Ct. 316 (1981): The plaintiff was demoted from his position as manager of a sales department because the company wanted to combine the duties of two positions. The plaintiff worked in the lesser position for less than 2 months and then resigned and found employment with one of the company's competitors. The jury returned a verdict for $51,977; the court entered judgment on that amount plus an additional $51,977 as liquidated damages, attorneys' fees of $60,000, costs, and pre- and post- judgment interest, a total of $163,954. The court also ordered that the company offer to reinstate the plaintiff. On appeal, the Fourth Circuit affirmed the monetary award with the exception of the award of pre-judgment interest.

4. Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir 1980): The plaintiff was employed as an engineer by the company until his discharge at age 44 for unsatisfactory performance. The jury returned a verdict of $126,760 for the plaintiff for back pay and liquidated damages, and the court awarded $83,382.13 in attorneys' fees and costs, for a total of $210,422. The Third Circuit modified the award of attorneys' fees and costs in minor respects, but affirmed the jury award of actual and liquidated damages.

5. Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979): The plaintiff was a sales manager who was hired at age 50 and was terminated at age 54 because of his inability to generate enough business in Latin America to justify his salary. The jury returned a verdict of $90,700 for the plaintiff; the district court entered judgment on that

amount, ordered an additional $90,700 as liquidated damages and $42,500 as attorneys' fees, and awarded $90,000 and a pension commencing at age 70 in lieu of reinstatement.

EXAMPLES OF JURY VERDICT REDUCTIONS AND REVERSALS

1. *Lovelace v. Sherwin-Williams Co.*, No. 80-1879 (4th Cir. June 15, 1982), *reprinted in* 134 Daily Lab. Rep. D-1 (July 13, 1982): The Court of Appeals for the Fourth Circuit ruled that the lower court properly overturned a jury verdict in favor of the plaintiff, a 55-year-old employee who had been demoted from a store manager position due to declining profits at the store, poor management, and personnel problems. The lower court judge granted the company's motion for judgment notwithstanding the verdict, concluding that the company had introduced "overwhelming" evidence of legitimate reasons for the demotion. The Fourth Circuit affirmed, emphasizing that the plaintiff had given only his own "self-serving" opinion that his performance had been satisfactory and had not refuted the company's consistent and corroborated evidence that the plaintiff's performance had declined and that he had failed to take the corrective action suggested by the company. The court concluded that the employee's evidence was not sufficient to allow a jury to infer that age discrimination was a determinative factor in the demotion. The court noted that although it was possible that the jury could have inferred a deliberate contrivance to set up the plaintiff's demotion based on the fact that the employer began increasingly to find fault with the plaintiff's performance in the latter stages of the plaintiff's tenure, "[s]uch a leap of inference could only be by rank speculation and not by any rational processes of inference." 134 Daily Lab. Rep. at D-7.

2. *Parcinski v. Outlet Co.*, 28 EPD ¶ 32,483 (2d Cir. 1982): A jury returned a verdict for the plaintiff in an ADEA suit in the amount of $93,500. The trial court added an additional $93,500 in liquidated damages. On appeal, the judgment was reversed since the record was devoid of any proof that age was a consideration in the decision to relocate the plaintiff or of any evidence that could raise an inference of discriminatory motivation on the employer's part. The court found that the company's reorganization was a rational business decision and emphasized that the ADEA "does not authorize the courts to judge the wisdom of a corporation's business decisions." *Id.* at 24,139.

3. *Coburn v. Pan American World Airways, Inc.*, No. 81-1086 (D.D.C. May 7, 1982): A jury trial resulted in a verdict in favor of the plaintiff in a suit under the ADEA. The court granted the company's motion for judgment notwithstanding the verdict based on its conclusion that the record was "utterly devoid of evidence of any type from which a reasonable juror could infer that a likely cause of plaintiff's termination was his age." Slip op. at 5. The court noted that "'an employer may make an employment decision for a good reason, a bad reason, or no reason at all,' so long as impermissible discriminatory distinctions do not influence that decision" and cautioned that "[n]either the Court nor the jury may find for the plaintiff in order to reward past services to defendant or because of some general feeling that plaintiff deserved better from his longstanding employer." *Id.* at 6, 7. The court concluded that the jury's verdict finding that the plaintiff was terminated bacause of his age must have been based on "sheer surmise and conjecture." *Id.* at 5.

4. *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981): The jury returned a verdict for the plaintiff in an ADEA suit awarding $800,000 in damages. The court ordered a remittitur of damages in excess of $250,000, which was accepted by the plaintiff in lieu of a new trial. On appeal, the employer claimed that there was insufficient evidence to support the verdict as well as passion and prejudice on the part of the jury. The Second Circuit agreed with the employer and reversed the lower court, holding that the plaintiff had not even established a prima facie case of discrimination. The court emphasized that the plaintiff's circumstantial evidence "failed to show any conduct on the part of Ebasco which could be logically linked to a finding that [he] was dismissed because of his age. We believe that this is so clear that reasonable minds could not differ and that the defendant's motion for a directed verdict should have been granted." *Id.* at 924.

5. *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979): The trial court granted the company's motion for judgment notwithstanding the verdict after the jury returned a verdict in favor of each of the five plaintiffs in an ADEA suit challenging a reduction in force. On appeal, the Court of Appeals for the Sixth Circuit upheld the lower court's entry of judgment notwithstanding the verdict, concluding that there was not even a "scintilla" of evidence to support a conclusion that the seniority system was not bona fide, and that the evidence concerning whether the system was a subterfuge to avoid the ADEA was insufficient to submit to the jury.

6. *McGregor v. CCH Computax, Inc.*, 18 EPD ¶ 8919 (D. Cal. 1979): A jury verdict for plaintiffs who alleged that the company's decision to terminate them violated the ADEA was

overturned by the trial court, which granted the company's motion for judgment notwithstanding the verdict. The court found that there was no evidence in the record to support the contentions of the plaintiffs or to indicate that the company did anything inequitable in its termination of the plaintiffs; rather, the evidence indicated that the employer's decision to terminate the employees was based on economic considerations. The court concluded, "Under all of the evidence, a reasonable trier of fact employing all reasonable inferences could not reasonably find liability by a preponderance of the evidence for the defendant's termination of the plaintiffs . . . ."

7. Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980): After a jury returned a verdict for the plaintiff in an ADEA case, the trial court granted the employer's motion for judgment notwithstanding the verdict. The Court of Appeals for the Fourth Circuit found that the lower court's entry of judgment notwithstanding the verdict was proper, since the evidence introduced by the plaintiff was entirely insufficient to support his claim that he was discharged due to age discrimination. The court also found that there was no evidence that the company preferred younger employees. The court concluded that, even if the plaintiff had established a prima facie case under the ADEA, the employer had shown a legitimate, non-discriminatory reason for the discharge and there was insufficient evidence to support a finding that age was a determining factor in the employment decision.

8. Hedrick v. Hercules, Inc., 658 F.2d 1088 (5th Cir. 1981): A jury award of $103,887 in damages to a single employee under the ADEA was found to be excessive and was reduced by the district court to $52,887. The district court's reduction of the jury award was upheld on appeal, as was its award of $26,443.50 as liquidated damages, even though the court indicated that the company had made a good faith effort to comply with the ADEA. The Court of Appeals found that the district court did not abuse its discretion in denying the company's motion for judgment notwithstanding the verdict or for a new trial despite the excessive jury award.

Senator **Nickles**. Thank you, Mr. Braithwaite.

Mr. Bakaly?

Mr. **Bakaly**. Yes, Mr. Chairman. I am Charles Bakaly, a member of the law firm of O'Melveny & Myers of Washington and Los Angeles. I am the past president of the American Bar Association Section of Labor and Employment Law—a section of over 12,000 employer and union lawyers throughout the United States.

I am not here today appearing on behalf of the American Bar Association or its section of labor and employment law, but only as an individual. We very much appreciate the opportunity to have these hearings because we are very concerned about Congress proceeding hastily in removing the cap of age 70 when there are so many other problems with the Age Act that really need resolution. By proceeding hastily, Congress will cause serious problems if it does not take the time to have full consideration of all of these problems.

We are still basically concerned about the effect of removing the cap on the employment of younger people, minorities and women. We have read the interim study of the Department of Labor. We hope that the final study comes out, but certainly this committee should wait for the final study.

But if the final study is not much different from the interim study, it really does not solve today's problem. Today is an entirely different situation than where we were when that study was done. That study was done in 1979–1980. Since then, this country has been in a serious recession. We have unemployment in California and elsewhere in the 10-percent area. Nationwide, it is 9.8 percent. This impacts seriously on less senior people under collective-bargaining agreements and elsewhere. Ordinarily, an employer will terminate younger people first.

This factor of the recession has not been given consideration by the Department of Labor. One of the basic tenets of that interim report, Mr. Chairman, is that very few people will retire. They say 200,000, but at the same time, elsewhere in this Congress, we are talking about increasing the age at which you can get social security to age 68. We are talking about removing the present provision that you do not have to accrue benefits after normal retirement age. We are talking about removing those things.

All of those things, together with increasing inflation, will cause people to work longer. So, that basic premise is clearly subject to doubt, in our view.

Second, when they talk about the fact that there is no effect on the employment of young people, they compare the job that the person who is 70 leaves with the person that comes into that job. Well, sure, that is not going to be a younger person. Management and companies operate on a tier system. You are going to have a 60-year-old or a 65-year-old take the job of a 70-year-old when he retires. But then his job has to be filled by somebody and the job below him has to be filled by somebody, and that is where the promotion of women and minorities and other young people is going to be seriously affected.

Now, there is one other important point that removing the cap is going to require us to do. It is going to require employers to start to build cases on older workers. First of all, this is not something that we like to do. When somebody has been with a company for 25 or 30 years, you do not like to say, "Joe, you really are not doing the job now because you have slowed down."

But if we do not have an age—it used to be 65; we are able now to live with 70—if we do not have an age that we can normally retire those people at, then we are going to have to start to build a case on the incompetent people.

What is that going to do? That is going to greatly increase the number of these age discrimination cases. As Senator Quayle pointed out, they are already on the incline tremendously. They are going to clog the courts with these cases, and we are very much concerned, as Chief Justice Burger is and others, with the congestion in the Federal courts.

Jury trials take a much longer period of time than nonjury trials to try. If we do not look at this whole statute, Mr. Chairman, we are going to cause serious problems with congestion in the courts and we are going to cause serious problems in our relations with our employees.

We would hope that Congress would seriously consider this statute, and if they are going to amend the statute, let us amend it in its entirety. Let us eliminate the jury trial. There is no basis for having a jury trial in an age discrimination case and not in a sex or race case. There is absolutely no basis for that. Senator Quayle, while you were gone, made that point; it is absolutely correct.

We have got to eliminate the penalty of the double damages. That is not in title VII. There is no reason for the older people to have that kind of a benefit.

So, what Congress should do, in our view, is to go slow; slow down, take a look at these problems, and do not move quickly here in an area that may cause serious problems for employers.

Thank you.

[The prepared statement of Mr. Bakaly follows:]

STATEMENT OF CHARLES G. BAKALY, JR.

August 18, 1982

Mr. Chairman and Members of the Committee:

I thank you for the opportunity to speak with you today on S. 2617, a bill to amend the Age Discrimination in Employment Act ("ADEA") by eliminating the age 70 ceiling for protection under the ADEA. As a member of both the California and the District of Columbia Bars, I have been representing in the labor and employment law fields employers throughout the country for over twenty-five years. Although I am the past chairman of the Labor and Employment Law Section of the American Bar Association, I am speaking today as an individual and not on behalf of the ABA. Eliminating the age 70 cap is an issue of great concern to the business community and I urge you to study carefully the potential far-reaching effects of such a move before taking any action on the proposed amendment.

As part of the 1978 ADEA amendments, Congress required the Department of Labor ("DOL") to study the effects of raising the protected age limit to 70, particularly on younger and minority members of the labor force. In its Interim Report submitted to Congress in December 1981, the

DOL concludes that raising the mandatory retirement age has had a minimal effect on employers' retirement policies, employees' retirement decisions and employment opportunities for younger and minority workers.

The conclusions of the DOL, however, are based on outdated statistics gathered prior to this great recession which we are presently experiencing. The changed economic climate casts doubt on several crucial assumptions underlying the DOL's findings. The DOL found, for example, that the number of older employees expected to work longer as a result of delayed mandatory retirement was small, primarily because of financial incentives for early retirement such as full social security benefits available at age 65 and no mandatory accrual of pension benefits after normal retirement age. The DOL does not adequately study how many older people will choose to work past age 65 if these financial incentives disappear. This possibility cannot be ignored; discussions concerning reducing incentives for early retirement are currently taking place. This committee must take note of the Congressional Budget Office Report which concludes that raising the age of eligibility for full social security benefits and requiring continual accrual of private pension benefits beyond normal retirement age will significantly affect an older worker's decision to retire. See 148 DLR A-4, A-5 (August 2, 1982). Accordingly, we can expect to see many more older workers than the DOL envisioned if there is any reduction in economic incentives for early retirement.

Furthermore, the study based its predictions on how many older people would continue to work past age 65 on statistics gathered and studies conducted prior to 1980. The economic environment in which the subjects of the studies were making their decisions was very much different than today's. More than ever before, inflation erodes the financial security of individuals. As a natural reaction, more older people will decide to continue working rather than place themselves in the precarious position of seeing inflation rise much faster than the amounts of their pension and social security checks. Predictions based on pre-recession behavior of older workers are not valid today.

Supporters of this bill have cited this DOL study on the floor of the Senate to argue that the fears in 1978 about the effects of raising the mandatory retirement age on younger and minority workers were unfounded. See, Cong. Rec. S. 6623, S. 6624, S. 6626 (daily ed. June 10, 1982) (Statements of Senators Heinz, Kennedy and Percy). The DOL's conclusion that raising the mandatory retirement age had a minimal effect on younger and minority workers is unpersuasive.

Although recognizing that eliminating mandatory retirement will affect both promotional opportunities as well as job-slot availability for younger and minority workers, the DOL concentrates on the direct impact on those younger and minority workers who hold wage-comparable positions as older workers. Not unexpected, the DOL found that when wage comparable workers were compared, job slot competition was insignificant.

The study concludes, "it would seem that such labor market concerns as youth unemployment and affirmative action are not likely to be worsened by the change in mandatory retirement age. Few older workers are projected to continue to work past age 65, and those that are likely to do so represent potential competition for a very small number of younger, female and black workers." Executive Summary, Interim Report, p.24. Two weaknesses in the DOL's conclusion are readily apparent. First, the assumption that few workers will decide to work beyond age 65 is based on pre-recession statistics as well as the belief that economic incentives for early retirement will continue. Both basis are of questionable validity. Furthermore, by limiting the study only to the impact on those younger and minority workers who directly compete for jobs with older people only superficially addresses the issue.

The study analyzes only briefly the impact of raising the mandatory retirement age on promotional opportunities for younger and minority members of the labor force. When an employee leaves by retirement an opening is created, which must be filled. In turn, the previous job of the retiree's replacement must be filled, and the ripple effect continues down the ranks of the employees. The DOL study dismisses summarily any impact that retention of large numbers of older workers would have on promotional opportunities for minorities and youths. The high unemployment rate for minorities and young people is a grave concern, and such a shallow analysis of a change which may exacerbate the problem is irresponsible.

Moreover, American workers are facing today the "worst lay-off figures since the depression." BNA Labor Relations in an Economic Recession: Job Losses and Concession Bargaining, BNA Special Report, DLR No. 137, p.3 (July 16, 1982.) Unemployment hovers around 9.8%, with projections that it will reach 10.5% this year. 142 D.L.R. A-3 (July 23, 1982). Jobs are being eliminated at an alarming rate, impacting most significantly those younger workers with less seniority. A study is needed to address how eliminating mandatory retirement, with the concomitant increase in workers over 65, will further affect the high unemployment rates for minorities and young people.

An additional Congressional concern in 1978 was the effect a change in the mandatory retirement age would have on performance evaluations of older workers. Employers who cannot mandatorily retire older, long-term employees who have slowed down will be forced to institute a rigorous performance evaluation system which will be hard on both the employer and the employee. No doubt employers would rather provide these loyal, long-term employees with a dignified method of leaving their employ than subject them to degrading, costly evaluations. Again, the DOL's study does not adequately address this very human concern. Before Congress acts, it must carefully examine the desirability of rigorous performance reviews, the employers expected response to the natural aging process, if it can no longer count on its employees retiring at a definite age.

Furthermore, by eliminating the age 70 ceiling under the ADEA, Congress will significantly increase the pool of potential age discrimination plaintiffs, and the number of jury trials in our over-crowded courts. Chief Justice Burger's concern over court congestion is shared by many. Not only do cases for which a jury is requested take longer to get from completion of the pleadings to trial, a much higher percentage of trials lasting more than four days are jury trials as opposed to bench trials. See, 1981 Annual

Report of the Director, Administrative Office of the United States Courts, 128, 129. Unnecessarily clogging the courts even more than they already are must be avoided. No compelling argument has been made which explains why jury trials are needed in age discrimination lawsuits, but not in suits involving other types of discrimination. Moreover, attempts to dismiss claims that jurors are biased in favor of the aged and against large companies defy common sense. Consequently, if Congress eliminates the age 70 cap entirely, thereby increasing the number of jury trials in the federal courts, it should, in light of the potential burdens placed on the federal courts, likewise eliminate the right to a jury trial under the ADEA.

In conclusion, the proposed elimination of the ADEA's age 70 cap will have far reaching effects, particularly on employment opportunities for young people and minorities. The DOL's analysis of these effects is inadequate for the reasons discussed above. Congress should, therefore, postpone any action on the proposed amendment until a full-scale, in-depth, contemporary study is completed.

Senator NICKLES. Thank you very much.

Mr. Thompson, we have talked about mandatory retirement, and I asked Secretary Lovell—does present law require a mandatory retirement at age 70?

Mr. THOMPSON. No, sir, and I think that is a very good point that needs to be made in a clearer fashion. There is nothing in any of these laws that I know of which requires an employer to retire people at any age. There is nothing that prohibits the employment of workers over 65 now, or over 70 or over any age now.

That is the reason that such outstanding men as Senator Randolph and Congressman Pepper can serve in Congress. It is not because of mandatory retirement ages; it is the fact that the privilege is there. It is a form of voluntarism. It is a system that has worked, I think, very well in the past.

I think that to take this cap off of age discrimination now is going to really open a Pandora's box, especially with these flaws in the present law. If we do not correct those flaws in this present law and take this cap off at the same time, I think you are going to have utter chaos in industry in this country.

Senator NICKLES. Is there anything in present law that would prohibit an employer from hiring somebody that is, say, 72 years old?

Mr. THOMPSON. No, sir, nothing at all. Let me give you a personal example of that. In addition to being a chamber of commerce annual witness before this committee, I am also a practicing lawyer and I am the head of a law firm. Last year, we employed a very distinguished man at the age of 70 who had just retired as a member of the National Labor Relations Board, and he is still employed with us at age 72, and works every day and is a very productive member of our law firm. I do not know what better example you could have of an employer actually employing people at that age. He is covered by all of our benefit programs and the whole works.

There is nothing that prohibits the employment of people at any age, and I hope there never will be.

Senator NICKLES. I was asking that for somewhat of a selfish motive because we have employed several people at the company I work for. Out of a total employment of 100, we have 3 or 4 that are beyond—we have many, many more beyond the age of 65, and I think we have 3 beyond the age of 70 who are currently employed.

Hearing all of this talk about mandatory retirement, I wanted to make sure that there was not anything in the law that would prohibit an employer from keeping a person beyond the age 70, and that is the case.

Is there anything in the law today that would prohibit hiring a person that is beyond that age?

Mr. THOMPSON. No, sir, and I hope there never will be.

Senator NICKLES. I would concur with that.

Present law under title VII does not allow for discrimination cases to be taken before a jury trial or to have double damages.

Is the Age Discrimination Act too punitive, or should we allow jury trials, say, for title VII cases?

Mr. THOMPSON. Well, I certainly do not think you should allow jury trials for Title VII cases, for very similar reasons. You would not only clog the courts further, but you would put employers in an impossible position, as has been done under the ADEA—what has happened under age discrimination legislation is they combined title VII coverage, prohibition against discrimination, with Fair Labor Standards Act enforcement procedures, and they really do not fit.

You know, it takes a little leadtime for one of these laws to really make its full impact felt, and that is what we are seeing in age discrimination now. These cases are going to juries, and just outrageous verdicts are coming back from the juries, because here is an old person who has put in a long period of time with an employer and who arouses great sympathies on behalf of a jury, which is understandable. It is like taking somebody who has been terribly injured in and arousing the emotions of a jury.

This is just not the type of enforcement that you ought to have under such a technical law as this. We think that the system under the equal employment laws generally should apply to age discrimination. In fact, I will make the statement here and now for this record that as far as I am personally concerned, I would recommend to the Chamber to trade this cap removal anyday if we could eliminate that jury trial and those liquidated damages, which I think are just devastating. I do not think we have even seen the beginning of the impact of those provisions on the employers in this country.

Senator NICKLES. Mr. Bakaly, you mentioned that you have been involved in many of these cases. Are those cases usually filed under a class action or are they usually filed just for the individual himself?

Mr. BAKALY. They can be class actions under the Fair Labor Standards Act, as Mr. Thompson pointed out. Most of them now are individuals, unless there has been a mass layoff of a company because it was decreasing because of lack of business or something like that. Maybe there could be a class action there.

Senator NICKLES. Have you felt like some of these claims have been abusive; in other words, an individual was filing that claim as a means or a method to get to an employer for whatever reason?

Mr. BAKALY. There is just no question about that, Mr. Chairman. The prospect of double damages is a very important item, as you pointed out. The test, Mr. Chairman, is "willful," and willful has been interpreted by the courts to be "intentional."

So, even if an employer intended to terminate the person, that would be a violation. So, it is a very easy standard to meet to get double damages under the act. And as Mr. Thompson said, it is just impossible for an employer, particularly a large employer—and this is not only my experience in trying many of these cases, but in talking to other lawyers across the country—it is impossible to get a fair trial from a jury.

Not only are they emotionally inclined toward the individual plaintiff, but they are emotionally upset at the large employer for reasons other than the reasons of the case. We just had a recent case for a large retailer which I am sure everyone on the jury had bought a product from such retailer. Many may have been dissatisfied with items purchased from that large retailer, and the jury came down with a judgment of over $1 million against that retailer. It was cut by the court and eventually reversed on appeal. But that kind of prejudice against employers makes us very, very wary of juries in these kinds of cases.

Senator NICKLES. Are the rights for a jury trial and liquidated damages disincentives for outside settlements?

Mr. BAKALY. Absolutely. If we did not have that possibility, it would be much easier to settle these cases. The possibility of a plaintiff getting a gigantic award from a jury that is upset at the employer and sympathetic with the plaintiff is one of the things that stops these cases from being settled. There is just no question about that.

Senator NICKLES. Mr. Braithwaite, it was mentioned by one of the members of the panel that it might cause employers to build a case. Presently, they may have a marginal employee that has several years but is still marginal as far as their efficiency or productivity as compared to other employees, where an employer might be willing to let that employee work to age 70. But, now, if that cap were taken off, they would be more inclined to "build a case" to prove their case for a dismissal, which could put them in a negative relationship not only with that employee but also with other employees.

Do you see that as a possibility?

Mr. BRAITHWAITE. It is not a possibility; it is here, sir. Many of us are in forced down-drafts because of the economic condition of this country, and we are literally discharging people with 32 years of service for incompetence. It is painful to do it, but under the law and under the evolving interpretations from the courts, we have no choice.

I would urge the Senator to consider what we are doing in terms of forcing us to build cases, and we are. We are recording performance like we never had to in the past and we are making some very hard decisions because of the law, with inability to settle.

I support fully what the other two gentlemen said about the impact of liquidated damages and jury trials in killing settlement. I am working with a case right now where I thought I had settlement with the EEOC, where the individual rejected the EEOC's recommendation. We are now preparing for trial and it is merely the liquidated damage aspect he feels that he may get.

Senator NICKLES. The opportunity for being able to receive a large reward?

Mr. BRAITHWAITE. A larger sum.

Senator NICKLES. Let's say I am that individual worker, and I am 67, 68, or 69, and I do not know whether I want to work beyond the age of 70 or not, and possibly the employer has been flexible. Maybe his standard rule is, yes, we generally have retirement at age 70, but he will make exceptions when the individual is both productive and also willing and eager to work beyond that time.

If we took the cap off, would it be more likely for that employer to be building this case? A lot of these cases, I would think, would be very hard to judge. I am thinking not so much of the manufacturing line where you see so much output, but more of a white-collar or gray-collar area where productivity is a little harder to delineate.

Mr. **Braithwaite**. If you look at the cases that we have attached to our statement, I think you will find that you are quite correct in that assumption. Most of the difficult litigation is in the management professional area where it is more difficult. You do not have that problem with a tradesman or a production worker in most cases. And that is what is making it extremely difficult in this area, and the need for building the case.

Senator **Nickles**. Which leaves it that much more questionable if you go to a jury trial.

Mr. **Braithwaite**. And one of the things I might say, Senator, is in our personal experience in United States Steel, more than half of our cases are not from people about retirement. It is for missed promotions; it is for demotions, trying to match them against a job that, in our judgment, they can do; and for extremely poor performance.

We are not having a problem with the person that says: "I want to stay and work because I am now 70 years old." Our problem is heavily in the low area. We are seeing, I would say, in my opinion, abuse by the people between 40 and 70. We are not having, really, the problem with the older worker.

Senator **Nickles**. Would you concur with Mr. Thompson's statement that he would be glad to take the cap off if we could see some reforms under the Age Discrimination Act?

Mr. **Braithwaite**. As an individual, I would support that statement, yes, sir.

Mr. **Thompson**. Senator, could I just make one more point having to do with this enforcement procedure?

It is having the tendency to polarize employers and employees more at a time when we need to bring employers and employees together to deal with worldwide competition. I think that ought to be taken into account in your considerations. That is the reason I feel so strongly that the enforcement procedures should be looked at more carefully than they are being looked at at the present time.

Senator **Nickles**. These enforcement procedures under existing law, although designed to protect some employees, are actually detrimental as far as the climate and the atmosphere and this building of cases, and knowing, particularly, if the cap was taken off that eventually a case would have to be made.

Mr. **Thompson**. They are promoting litigation. They are promoting conflict between employers and employees at a time when we do not need any more of that. We need more cooperation and better productivity, and those kinds of things.

Senator **Nickles**. I appreciate that.

Gentlemen, I appreciate your appearance before our subcommittee today.

We do have a vote right now. It is my intention to reconvene the hearing after this vote.

We will stand in recess.

[Whereupon, a brief recess was taken.]

Senator **Nickles**. I am ready to begin with the aging panel: Mr. Edward Howard, National Council on the Aging. Who is Mr. Howard?

Mr. **Howard**. Here, Senator.

Senator NICKLES. Welcome.

We also have Mr. Sikorsky. Is that pronounced correctly?

Mr. SIKORSKY. Yes, Igor Sikorsky, and my partner, David Waters.

Mr. NICKLES. From Hartford, Conn.?

Mr. SIKORSKY. Yes.

Mr. NICKLES. And also Mr. James Hacking, representing the American Association of Retired Persons. Welcome; we are glad to have you before our committee again.

Gentlemen, again I will apologize for the fact that the bells keep ringing and we have to trot back and forth. I will repeat that your statements will be entered into the record in full. In the event that we do not have time to go through the questions that I or other members of the committee might have, we will submit those to you and anyone else that has appeared before us today.

Mr. Howard, would you care to proceed?

STATEMENT OF EDWARD F. HOWARD, GENERAL COUNSEL, NATIONAL COUNCIL ON THE AGING, INC., WASHINGTON, D.C.; IGOR I. SIKORSKY, LAW FIRM OF SIKORSKY, SHLUGER, ATKINS & WATERS, HARTFORD, CONN., ACCOMPANIED BY DAVID F. WATERS, LAW FIRM OF SIKORSKY, SHLUGER, ATKINS & WATERS; AND JAMES M. HACKING, ASSISTANT LEGISLATIVE COUNSEL, AMERICAN ASSOCIATION OF RETIRED PERSONS, WASHINGTON, D.C., A PANEL

Mr. HOWARD. Mr. Chairman, thank you for this opportunity to present the views of the National Council on the Aging this afternoon.

In deference to your time limitations, not only will our complete statement obviously not be read, but I will not read my prepared summary of my complete statement.

Senator NICKLES. Thank you.

Mr. HOWARD. What I would like to do, if it is permissible, is to——

Senator NICKLES. What do you want in this legislation? We are going to get along real well.

Mr. HOWARD. What I would like to do is to just address some points that you have heard raised in some of the earlier testimony, and perhaps give you a different perspective on a couple of things.

Senator NICKLES. OK.

Mr. HOWARD. Let me focus in on the general issue of mandatory retirement. Particularly from the last panel, you heard a lot of dire predictions about what would happen if the age cap were removed—the age 70 age cap—only for mandatory retirement. And I had a deja vu feeling because those were precisely the arguments that we heard in 1978 when we were considering the proposal to move it from 65 to 70. How could business ever survive if workers were allowed to stay beyond age 65?

I submit that those complaints are no more valid today about age 70 than they were in 1977 and 1978 about age 65. It is important to note that half of the workers in the United States are not even covered by mandatory retirement rules. Somehow, those employers of half the work force in the United States make management decisions that allow them to keep a productive, efficient work force without retiring people on account of age.

And it is not just small business. Three out of eight of the Fortune 500 companies have no mandatory retirement rules. I must admit I do not know the current situation, but at least when we were considering the 1978 amendments, United States Steel had no mandatory retirement age in its contracts that it had negotiated with the steelworkers union. So, at least so far as their blue-collar force was concerned, they had managed to get along without mandatory retirement.

Arco, Polaroid, Travelers Insurance—the names of the major companies are just easy to rattle off, of those companies that get along without it.

The fact is that age discrimination exists. Mandatory retirement is the most visible sign of it. The notion that employers who have, for an employee's entire worklife, been making decisions about when to give them raises, when to give them choice assignments, whether to promote them or not, or whether to retain them in doing the annual evaluations—that those people who have been doing those things the entire worklife of an employee are suddenly unable to do it at age 70 is an argument that has never held much credence to me.

In fact, our studies at the National Council on the Aging tend to show that older workers who remain on the job until age 70, who are a very small percentage of the total work force, are indeed the better workers. They tend to be more loyal. They are more likely to show up on time. They are less likely to have on-the-job accidents. They are, in short, good workers.

Let me just turn briefly to a couple of the procedural aspects, if I could. First, jury trials; now, I do not claim to have tried a lot of these cases. I am an in-house counsel who does a lot of telephone consulting. But I will tell you that as far as I am concerned, there is an awful lot of smoke being blown about the jury trial issue. I have not heard anything in the way of statistical evidence that aged plaintiffs get disproportionately higher awards or a higher percentage of successes than jury trial plaintiffs in other kinds of cases.

We tried to get some data together on a very small basis from EEOC. We could not get anything. Those cases are not even identified as age cases by the Administrative Office of the U.S. Courts.

But we have talked to defendants' attorneys who have said: "Look, I am very happy to take some plaintiffs to a jury trial. If they are somebody, as a lot of these people are—white-collar, upper level or midlevel executives—they have probably fired some people themselves, and there is nothing I would like better than to get that person on the stand and ask them about the decisions they have made adversely about firing and other negative decisions about people's employment histories."

Let me collect what is left of my notes here. One final point with respect to settlements; I have heard an awful lot of presentations, at meetings, by defendant-oriented attorneys in these cases. Indeed, our organization sponsored, along with the American Bar Association, including its labor law section—then chaired by one of your previous witnesses, as a matter of fact—and the Equal Employment Advisory Council, a symposium on Age Discrimination in Employment Act issues just this January.

What I am told by as many people as I can count is that defense strategy is, more often than not, to string these cases out. Plaintiffs are typically out of work and have no major resources, and the longer the litigation drags on, the less likely it is that the plaintiff is going to be able to successfully pursue it.

It strikes me as ironic that the same people who are encouraging these delays in litigation then come and say that one of the reasons this act should not be strengthened is that you have to increase the rate of settlement, and that plaintiffs are not ready to settle.

One final point, Mr. Chairman—I am sorry to have taken so much time—and that is we really favor some substantial changes to strengthen the act, including accrual of pension benefits and including the extension of the jury trial right to Federal plaintiffs, which was an oversight in 1978.

We favor a complete elimination of the age cap and we favor, as an interim step, S. 2617, the bill that would simply deal with the age cap as opposed to making the other substantive changes.

[The prepared statement of Mr. Howard follows:]

THE NATIONAL COUNCIL ON THE AGING, INC.
Since 1950 working to improve the lives of older Americans

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TOWARD AN END TO AGE DISCRIMINATION IN EMPLOYMENT

Testimony by

THE NATIONAL COUNCIL ON THE AGING, INC.

before the

SUBCOMMITTEE ON LABOR

of the

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

Wednesday, August 18, 1982

Washington, D.C.

Presented by:

Edward F. Howard
General Counsel

Arthur S. Flemming, J.D.; Anna V. Brown, James T. Sykes
Edith Sherman, Ph.D.; Barbara Skler; James H. Agee; Roger A. Baird
Jack Ossofsky

Mr. Chairman and members of the Subcommittee, thank you for this opportunity to testify today for the National Council on the Aging, a private non-profit organization in its fourth decade of service on behalf of older Americans. We are very pleased to be able to share with you today our views on the Age Discrimination in Employment Act as it stands today, how it might be strengthened and the importance of preserving its protections.

You should know, Mr. Chairman, that NCOA does not come without bias to issues involving discrimination against middle-aged and older workers.

NCOA's commitment to the older worker began at the time of its founding in 1950, when a Committee on Employment and Retirement was named, and has continued through the present. Permit me to sketch briefly for you some of the employment-related activities in which NCOA is engaged or has already completed.

Our National Institute on Age, Work and Retirement conducts studies and provides an extensive range of training and technical assistance for industry, labor, state and local councils on aging, and many others.

Since 1969, NCOA has published Aging and Work, the only national publication devoted solely to issues of age, employment, retirement and income as they affect middle-aged and older workers. Articles in Aging and Work focus on employment discrimination and industry's response to older worker issues. A regular ADEA column highlights court decisions, pending cases and settlements involving older workers.

The National Association of Older Worker Employment Services was created in 1978 as an NCOA program in response to members who wished to establish a national forum for an exchange of ideas and to have an impact on public policy recommendations.

One of NCOA's most effective demonstrations was its Industrial Health Counseling Service (IHCS) in Portland, Maine, which adapted an age-free method for matching workers to jobs. Funded by the U.S. Department of Labor, IHCS perfected a technique which was, according to DoL publication, a "giant step toward changing industry's attitude toward the aging process."

By allowing workers to be placed in jobs compatible with the applicants' skills, the project reduced the turnover rate in participating industries, eliminated Workmen's Compensation claims, and resulted in higher morale.

More specifically with respect to ADEA, NCOA joined earlier this year in Washington, with an employer group and several entities within the American Bar Association, to sponsor a highly successful seminar on legal and practical considerations about the Act for attorneys and personnel practitioners. Similar seminars are scheduled this fall in San Francisco and Houston.

NCOA worked very hard in 1978 to bring about the 1978 ADEA Amendments, which significantly strengthened the protections afforded to those covered by the Act, and broadened the scope of those covered by it.

NCOA is proud of its record of advocacy on behalf of middle-aged and older workers, and on behalf of persons of those ages who would work if the opportunity arose. As I indicated, we are not without our biases. Those biases do not include a preference for middle-aged or older workers regardless of competence or performance. Quite to the contrary, if we were convinced that the ADEA was assuring American workers and would-be workers that employment decisions were not to be prejudiced by stereotypes of the older worker, or individual preferences for "young blood" among those who hire and fire, we would be quite content to turn our critical eye elsewhere. These days, those concerned about the welfare of older Americans have no shortage of fires in need of extinguishing.

Regrettably, we have not yet arrived at that desirable state!

Age discrimination is the fastest growing area of employment complaints being received by the U.S. Equal Employment Opportunity Commission. Counting those handled by state agencies and those where age was one of several bases for filing, almost 13,000 charges of age discrimination were received in 1981.

We at NCOA are convinced, however, that these rapidly exploding caseload numbers represent only a fraction of the age discrimination older men and women are encountering. A nationwide survey conducted for NCOA by Louis Harris last year revealed that only half of the adults surveyed even know a federal law existed prohibiting age discrimination in employment. That same NCOA-Harris poll, entitled "Aging in the Eighties: America in Transition," found that 79% of those asked believed that "most employers discriminate against older people" in their attempts to find work. Even among those surveyed who said they were responsible for hiring and firing, 77 % agreed. Yet 90% of the respondents--and 92% of those under age 65--agreed that "nobody should be forced to retire because of age, if he wants to continue working and is still able to do a good job."

In short, Mr. Chairman, Americans don't like age discrimination in employment, but they are certain it's going on in "most" places.

Your efforts in scheduling this hearing are therefore most appropriate, Mr. Chairman. ADEA issues need to be discussed.

Mr. Chairman, there is one statement with which every witness at today's hearing would agree: changes are needed in the ADEA. I dare say that may be the end of the concensus. How should the Subcommittee sort through the various recommendations being made today?

Let me suggest, as a beginning principle, that you adopt the beginning principle of the physician's code of behavior: "First, do no harm."

Next, I urge you to bear in mind that the Age Discrimination in Employment Act is not merely a labor law, it is a civil rights law regulating discriminatory labor practices.

Last, you should be aware that encouraging a longer work life for older men and women will increase productivity and national output while making a positive contribution toward remedying social security financing difficulties.

The first principle, that of doing no harm, is directly applicable to proposals identified with certain employer groups and lawyers. These would eliminate the right of ADEA parties to choose a jury trial, the right of ADEA plaintiffs to request liquidated damages where the employer's violation was "willful," and federal preemption of State age discrimination laws.

Would these changes harm older workers and would-be workers pressing claims under the ADEA?

You are hearing more learned testimony that I can offer on these points, Mr. Chairman, but let me comment briefly on them.

Jury trials. Juries tend to be older than the general population. That's fact. Are juries therefore unduly sympathetic to older plaintiffs? Where is the evidence to back up that assertion? Indeed, the NCOA-Harris survey suggests that older people may be unduly harsh on their peers.

Respondents were asked to react to the statement, "Older people should retire when they can to give younger people more of a chance on the job." Those age 18-64 rejected that proposition, 62-34, but those age 65+ agreed by a margin of 50-44.

I suggest that, if anything needs to be changed with respect to ADEA jury trials, it is that the right ought to be extended to federal employees, as originally intended in 1978.

As to liquidated damages, my understanding is that they are intended to compensate the person discriminated against for intangible damages--loss of reputation or standing in the community, and damages from pain and suffering, which most courts have denied to ADEA plaintiffs. If those who would eliminate liquidated damages would agree to substitute these less easily measurable damages as compensable, the proposal could be taken seriously. And does any Subcommittee member doubt that one publicly denied a job for being "too old" suffers a loss of standing in the community? Perhaps uniquely among those protected under federal anti-discrimination statutes, older workers face stigmatizing when discriminated against.

Unique would also describe the proposal not to allow States to provide age discrimination victims with protections greater than those provided under the ADEA. Not only would such a change fly in the face of the traditional State interest in employment practices; not only would it be ironic to deny States such authority in an era of greater deference to State decision-making; but also our nation would be denied the rich variety of experiences that State "laboratories" provide to allow later rational refinement of federal laws.

NCOA urges the Subcommittee to reject these changes, for they would do harm--to middle-aged and older men and women, to federal-State relationships and to the

American system of justice--whereas the benefits they would produce are either obscure or run counter to good public policy.

How, then, should the Act be changed? NCOA believes the ADEA needs to be amended in two ways:

- to broaden the scope of those who benefit from protection under the ADEA; and
- to strengthen the protections afforded those who qualify for coverage.

Pension accrual. One important step that should be taken is to close the gap that allows employers to freeze pension benefits for workers who stay on the job beyond age 65. Not only is this a windfall to employers, it acts as a strong disincentive to older workers who might otherwise stay on the job. In fact, the DoL Interim Report estimates that allowing pension benefit accrual beyond age 65 would, by the year 2000, increase the labor force by some 68,000 older workers -- a greater impact than slashing social security benefits ten percent across the board.

Jury trial for federal workers. We believe that the language added to section 7 of the Act in 1978 was intended to grant a jury trial right to all parties, including those who happen to be employees of the Federal Government. Because the Supreme Court has decided that the language is insufficient to achieve that result, Congress should amend the Act to allow jury trials for federal employees.

Executive exemption. In 1978, Congress decided to continue forced retirement at age 65 for certain top executives and those in "high policy making" positions, if the employer was providing a pension of at least $27,000 a year. NCOA would like to see that provision eliminated completaly. If Congress does not choose to take that step now, the income threshhold should at least be adjusted to take account of inflation since 1978. We suggest a revised threshhold of $37,000, perhaps with annual adjustments in the future.

In the category of increasing the coverage of the Act, the most important limit, at least symbolically, is the Act's upper age limit for protection.

Lift the age cap. The Age Discrimination in Employment Act originally, and arbitrarily, protected most workers between the ages of 40 and 65. In 1978, just as arbitrarily, the age for protection was raised to 70. Now is the time to end the ADEA's internal hypocrisy by removing the upper age limit for protection.

The most prominent casualty of such a change would be the invidious practice of mandatory retirement at age 70. This practice robs those forced to retire of their mental and physical well-being and of a substantial share of their income.

Mandatory retirement is unnecessary. Three out of eight Fortune 500 companies do without it. Two million federal employees aren't subject to it. Indeed, half the labor force faces no mandatory retirement age at all, yet employers of that half of the labor force manage to survive and to compete.

Mandatory retirement is costly for America and America's government. The 1981 Labor Department interim report required by the 1978 ADEA amendments concluded that eliminating age-based forced retirement would induce almost 200,000 more older workers to remain in the work force. Those workers would not only increase gross national product measurably, but would have a healthy effect on the financing of social security, not to mention income tax revenues.

Finally, mandatory retirement is abysmally unpopular, as the data from the

NCOA-Harris survey show. The Administration supports an end to mandatory retirement as well.

But the importance of abolishing the age of 70 limit for ADEA protection lies not in the major shifts in employment policy it would bring about. In fact, such shifts would be relatively minor. Persons over 70 now constitute just 1.2% of our 105 million-person work force. Lifting the age cap would have a negligible impact on that figure. Rather, the importance of removing age 70 comes in its inherent message to older workers and potential older workers: you will be judged on your capability, not on the basis of some numbers on your birth certificate.

That message would not be lost, over the long term, on society. Removal of the age cap would help fight the stereotypes and negative biases that plague older job seekers, older job holders, older people generally.

That is why NCOA finds very difficult the position taken by the Administration: that age discrimination in employment should continue for Americans over 70 who are looking for work or looking for a promotion, and end only for those lucky enough to have a job and content enough not to be looking to advance in it.

Such a proposal presents some technical difficulties. If a particular training program is a prerequisite to a promotion, can a 70-year-old employee be barred? How about lateral transfers at the same pay but larger responsibilities: do they constitute "promotions"?

But the technical problems pale when measured against the policy ones: what sort of message does this send to employers about older job applicants or workers? To older people? To society? It says, in effect, an older worker is probably less able, less desirable. If he or she is already on the payroll, the employer owes him or her the job as long as the worker's performance doesn't fall below some minimal standard. But the government understands the situation, and won't foist any more of this gray-haired baggage onto employers. Some message. Some improvement.

NCOA does not denigrate the Administration's good faith efforts on this issue. The Under Secretary of Labor, in particular, has pursued a concensus with dignity and diligence. What he proposes is, in fact, a step forward. It is ironic, though, that the Administration which proposes to allow employers to discriminate on the basis of age against a 70-year-old job applicant is headed by someone who was, two years ago, a 70-year-old job applicant whom the country hired.

We must remind the Subcommittee that the ADEA is a civil rights statute. It flowed from the 1964 Civil Rights Act, and carries with it similar moral force. Such a split in protections for those age 70 and over is unprecedented and inexplicable. Although NCOA would prefer a Bill that went beyond "uncapping" to strengthen the Act's provisions, we certainly believe that Sen. Heinz is much closer to the target with his bill, S.2617 , which simply uncaps. And if it does not violate Senate protocol to quote a Member of the other body, let me express NCOA's agreement with the Ranking Minority Member of the House Select Committee on Aging, Rep. Matthew Rinaldo of New Jersey:

> If it is cruel and unjust to fire a person on account of age, it is equally cruel and unjust not to hire or promote a person on account of age.

Mr. Chairman and members of the Subcommittee, we urge that the upper age limit for ADEA protection be removed completely.

Thank you, Mr. Chairman. I would be glad to respond to any questions.

Senator **Nickles**. Thank you very much.

Mr. Sikorsky?

Mr. **Sikorsky**. Thank you, Mr. Senator. I will try to be very brief. I have filed a statement; I will let that stand for itself and try to deal with some of the questions that have come up about juries and about liquidated damages.

I might say parenthetically to you, though, that my father, who invented a helicopter, at the time he worked for United Technologies was mandatorily retired. He still had to come back through some sort of consulting way, because he was hit by a mandatory retirement, to do his last and most important work on developing a crane, which was one of the helicopter developments. So, I know what mandatory retirement is like, and he was still very productive and showed it.

Senator, we represent a trial firm that has a number of plaintiffs' cases. What you should know and what is not in the record yet is that the average age of claim of wrongful retirement for our plaintiffs because of age was 53.9—under 54 years.

Now, the reason this creates a different damage situation is this: You get a person, in our average case, that is retired under 54. They are—and the statistics are in your record already from a number of other people—in a much worse position to obtain reemployment. They are mandatorily retired. If they are forced to litigate, they wait 2 to 3 years to have their case heard.

Then, if they prevail—and they only prevail if it is found that they were discriminated against—if it is found that it is willful they do get liquidated damages, but they get all of their 3 years, let us say, in 1 year. Uncle Sam gets 50 percent of it, if you follow what I am getting at. There may be income averaging, but you get a lump sum income, and they are in a situation where their employability is much, much more difficult.

You should also know that the Federal courts—and we have done a survey; it is in our records—are not ordering reinstatement. We think that Congress, when they enacted this act, gave the Federal judges the power to reinstate, the power to award front pay, and the power to order reinstatement. In fact, we could only find 12 listed cases where the judge had exercised that power.

So, in fact, the victim of that discrimination is facing being in his mid-fifties, forced to accept a substantial discount on his pension in order to survive, if indeed he gets any pension at all, and that is the situation. That is what makes those age cases different from race and sex, because you are dealing, by definition, with an older age which, by definition—and statistics support it—have a much harder time getting reemployed. You are dealing with people that are in their mid-fifties. Age discrimination, unlike race or sex discrimination, gets worse over time because the individual gets older over time. Women do not get more female, blacks do not get more racial genetically, but older workers do get older and less employable.

I would like to ask my partner, David Waters, to address very quickly the question on juries, because you ought to know that that has its complications, if it were monkeyed with without a careful look.

Mr. **Waters**. Senator, on the question of jury trials——

Senator NICKLES. Your name, please.

Mr. WATERS. My name is David Fite, F-i-t-e, Waters, and I am with the firm of Sikorsky, Shluger, Atkins & Waters.

With regard to the juries, first of all I would like to point out that consistency actually cuts against the people that are talking about getting rid of jury trials. The Equal Pay Act allows for jury trials. The Civil Rights Acts of 1866 and 1871, which allow for suits under 42 U.S. Code §§ 1981, 1983, and 1985, allow for juries.

And we have found in our experience that it is much, much more common to have a sex discrimination case tied to an Equal Pay Act case and a sex discrimination or race discrimination case tied to a case under sections 1981, 1983, or 1985 than it is for anything else in the area of employment discrimination, such as age and title VII.

In essence, title VII is the outside force. Everything else allows for a jury. In cases where it happens that there is a conflict where part of it goes to a judge and part of it goes to a jury, you can either opt out of a jury or, in some cases, title VII clients have had advisory juries.

So, it cuts against consistency, I think, to argue that the Age Act should have no jury trial.

Second, I would like to reinforce from practical experience that yes, indeed, the defendants in these cases often do have excess motions, depositions, and string out clients. And we have found from seminars given to defense attorneys that the whole tactic is to string the plaintiff out; he will go away. So the argument that a jury trial slows the resolution of claims down is really not so. In fact, the age discrimination case we have had for the longest period of time in our office is not being tried by a jury; it was filed in Federal court in 1978, and the plaintiff has been subjected to 6 days of depositions, a mohin dismiss, and currently, a motion for summary judgment. The defendant company knows that we have clear evidence of age discrimination, but it hopes that 4 years of court time and massive legal fees will weaken the plaintiff so much that he will decide the case is not worth it.

Finally, I would like to point out that in the district of Connecticut, the jury trial list is actually shorter than the courtside trial list. So, I think it cuts against the timing that way.

More important, I would like to stress a practical aspect of removing a jury trial at this time. The Supreme Court, in *Lorillard* v. *Pons,* did not reach the issue of whether there is a seventh amendment jury trial right; they specifically did not need to.

If you were to take the jury trial away right now, you would give every single case that is now claimed to a jury an appealable right—an automatic appeal from the district court to the court of appeals to the Supreme Court as to whether there is a constitutional right to a trial by jury. Now, that means that it will take essentially about 3 years to reach that issue.

Further, what you then do is, even if you have a grandfather clause, it is just going to delay that. And then finally what happens is, if the Supreme Court decides that there is a right, every case that has been denied a jury trial will have an automatic retrial. So, I think for practical reasons, it would be unwise to remove the jury trial right; the courts will be in absolute chaos for well over 3 years and many people will be hurt, both employees and employers, by the additional time and fees necessary to resolve this question.

Thank you.

[The prepared statement of Mr. Sikorsky follows:]

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STATEMENT OF CONCERN

This office is actively involved in the representation of employees who have been discriminated against. We currently have over thirty employment-related discrimination actions, twenty of which are based on age under the Age Discrimination in Employment Act (ADEA). As one of the more active firms in the country which represents individuals, we are concerned about proposed changes to the ADEA; namely, the proposal to remove the right to trial by jury and the proposal to eliminate liquidated damages.

Based on our experience in the field, we herewith enclose our views relative to these extremely serious proposed changes and several other issues of importance which we feel Congress should be made aware of. Our concern is echoed by litigants, litigators and courts throughout the country. We emphatically urge that the proposed changes not be enacted.

Respectfully submitted,

Igor I. Sikorsky, Jr.

David Fite Waters

David Fite Waters

Diane M. Atkins

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LIQUIDATED DAMAGES

A. In Perspective

The ADEA was enacted with the specific purpose of deterring and attacking discrimination and "to help employers and workers find ways of meeting problems arising from the impact of age on employment." §2(b).

Age discrimination isdifferent from race and sex discrimination in one important respect. The protected class under the ADEA --individuals of age 40 to 70--is distinguishable from the group protected by Title VII--sex, race and national origin. The protected age group is a relative status to which all people who live a normal life will enter rather than a discrete immutable characteristic. Congress has found that older workers are "disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." §2(a)(1).

Liquidated damages are specifically provided for in Section 7(b) of the ADEA. The purpose of an award of 'liquidated damages' is to provide compensation for the more obscure items of damages resulting from an employer's willful discriminatory conduct. Rogers v. Exxon Research and Engineering Co., 404 F. Supp. 324, 325, 11 F.E.P. Cases 770 (D.N.J. 1975), reversed on other grounds 550 F.2d 834, 14 F.E.P. Cases 518 (3d Cir. 1977).

B. At Present

The ADEA was enacted in a time of "rising productivity and affluence." §2(a)(1). The current economic climate has an even more drastic effect on the older worker and ultimately, the United States and the employer. At this time of concern about the Social Security system, it is vitally important to keep older workers contributing to rather than withdrawing from the system. Termination of older employees is emotionally and economically devastating to the individuals. Since the status of age increases over time by definition, individuals often find that their employability decreases over time. Unlike race or sex, age discrimination is more calculated and more seemingly business related.

C. Underlying Policies

There is a very simple answer to an employer's argument that liquidated damages are an undue burden on business--don't discriminate. It is far more of a burden on the economy and the government to have unemployed and unemployable people who are in need of government subsistence and cannot afford to consume goods and services. To eliminate liquidated damages would be to shift the cost of discrimination from the employer to the government.

Liquidated damages are an important weapon against age discrimination. The very ease of proving that discrimination was willful operates as a regulatory check on an employer's acts. Without liquidated damages, it may be more economically advantageous for an employer to take the risk of discriminating. By replacing an older worker with a younger person at a lower salary, with the additional benefit of early retirement and decreased pension fund to be paid out, an employer can realize substantial savings. The increased potential cost of liquidated damages makes this risk less worthwhile.

D. Practical Effects

The average age of our age discrimination clients is 53-54 years of age at the time of administrative filing. It takes approximately 3-4 years until trial in the District of Connecticut. A pending EEOC study will reinforce the experience of our office that reinstatement or front pay are rarely ordered. Thus, the average discrimination victim is left with no source of income at mid-life, often with children in school and a mortgage to pay off. Congress has already recognized the high incidence of "unemployment with resultant deterioration of skill, morale, and employer acceptability." §2(a)(3). An award of back pay does not recognize the loss of the use of that money over the intervening years. Further, without reinstatement or front pay, an older worker is not made whole because he is still unemployable: liquidated damages serve as a recognition that no court can grant complete relief to a victim of age discrimination, but that some attempt will be made to compensate them as fully as possible.

JURY TRIALS

A. In Perspective

The ADEA as originally enacted provided no provisions for a jury trial. Section 626(b) of the ADEA empowers the court to grant such legal and equitable relief as may be appropriate. The issue then arose as to whether a jury trial was to b e allowed in ADEA actions, and if so, to what extent considering the legal and equitable relief sought. In arguing for a jury trial (which substantially affects the substantive rights of the plaintiff), plaintiffs relied upon F.L.S.A. procedures and decisions to gain a jury trial while defendants relied upon the analogy to Title VII sections to argue that jury trials were not allowable. The only specific reference to jury trials in the Congressional hearings was made by Senator Javits while speaking of the factual issue(s) to be resolved in ADEA actions:

> "The whole test is somewhat like the test in an accident case. A jury will answer yes or no. The question here is was the individual discriminated against solely because of his age? The alleged discrimination must be proven and the burden of proof is upon the one who would assert that was actually the case."

Senate Hearings on S.830, 788, before Subcommittee on Labor, and Public Welfare, 90th Cong., 1st Sess. (1967) S. Rep. No. 723 y/4 L11/2:AG3/9.

The question of whether jury trials would be provided in ADEA actions was resolved by the Supreme Court in Lorillard v. Pons. -U.S.-, 16 F.E.P. Cases 885 (1978). Here the reliance of the ADEA upon "the powers, remedies and procedures" of the F.L.S.A. and the fact that F.L.S.A. actions had long recognized a right to a jury trial, prior to the Congressional hearings which placed the ADEA within the enforcement provisions of the F.L.S.A., was emphasized to support the mandate that jury trials be held on issues of fact in ADEA actions.

In 1978 the Congress amended the ADEA and included, among other changes, the specific allowance of jury trials. The amendment to sections 626(c)(2) provides:

> "In any action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

Whether this amendment provides a right to a greater number of factual issues has not been determined. Specifically, the determination of whether a successful plaintiff should be reinstated has been retained by the judge in ADEA actions. Yet the question to be resolved is whether there exists such animosity between the plaintiff and his former employer as to make reinstatement unreasonable. This factual question is one which the jury should be allowed to resolve.

The Supreme Court specifically refrained from addressing the issue of whether a jury was mandated by the Seventh Amendment. Lorillard, 16 F.E.P. Cases at 886. Because of Lorillard and the 1978 Amendment, the Seventh Amendment question has not been decided to this day.

B. Practical Effect of Removal

The greatest impact of removing the jury right from the ADEA would be on those cases already pending. Every case that was brought would have an automatic appealable issue--i.e. whether the Seventh Amendment requires the court to allow for jury trials under the ADEA. Even if such a claim is ultimately denied, the time lag required to bring an appeal to the Supreme Court and the time necessary for the Supreme Court to render an opinion would send the entire system into chaos. In the event that the Seventh Amendment claim were granted, every case that had been denied a jury would be entitled to a retrial. Congress and the courts have already created a jury right; it would be foolish to alter the rules at this time.

C. Consistency

Despite contentions by employers to the contrary, it is more consistent with the law of employment discrimination to maintain a jury right under the ADEA. In our experience, Title VII with its non-jury provisions is the exception rather than the rule. Quite often, Title VII cases are tied to claims under the Equal Pay Act or to claims under the Civil Rights Acts of 1866 and 1871. All of these statutes allow for trial by jury. Further, pendent state claims and claims based on diversity of citizenship are occasionally attached to Title VII cases. To remove the jury right under the ADEA would actually cut against consistency rather than promote it.

D. Underlying Policies

In addition to the confusion and increased inconsistency that denying a right to jury trials would bring, there are other factors that justify maintaining this right. In our experience, jury trials do not add an appreciable amount of time to litigation and the right to a jury can always be waived. In fact, in the District of Connecticut a case takes longer to reach a court-side trial than it does on the jury docket. Advisory juries are occasionally used in Title VII actions, particulary where claims in which a jury is allowed are attached to the Title VII claims. Finally, age discrimination actions are more tangible to the average juror and less technical than many other actions where jury trials are allowed. Because the American system of jurisprudence is based on the right to a trial in front of one's peers whenever possible, Congress should be extremely hesitant to remove this right, particulary where it has already been granted and where there is a potential Seventh Amendment consititutional claim.

ADMINISTRATIVE FILING

A. In Perspective

An employee must file an administrative complaint with the EEOC and any applicable state fair employment agency before bringing suit under the ADEA. §7(d). The purpose of this administrative finding is to allow for investigation and conciliation of any alleged discriminatory practices. The time allowed to file such a complaint is necessarily explicitly limited. However, two recent Supreme Court decisions have created needless confusion and additional litigation as to the beginning of this time period. The Court, in Delaware State College v. Ricks, -U.S.-, 24 F.E.P. Cases 827 (1980) (5-4), and Chardon v. Fernandez, -U.S.-, 27 F.E.P. Cases 57 (1981) (per curiam 6-3), interpreted the term of art "act of discrimination" to mean the decision to discriminate rather than the effect of that decision. Ricks, 24 F.E.P. Cases at 830; Chardon, 27 F.E.P. Cases at 58. The Ricks holding was made retroactive to cover all pending cases.

B. Practical Effect

This issue of timing is only difficult with respect to terminations and promotions. It is generally quite easy to determine the date an applicant is denied employment or notified of the decision. However, with promotions, and even more so with terminations, additional circumstances often confuse the issue. Long interim periods between the date of the decision and the date the decision is acted upon are often filled with negotiations which add to the confusion of defining explicitly the date of the discriminatory act.

The most pressing problem created by Ricks and Chardon is that of uncertainty. In many cases handled by our office, the question arises as to when the employee knew of the decision, received notice of the decision, or should have known about the decision. This issue invariably leads to additional pretrial litigation with increased costs to both parties and additional time in the courts. This uncertainty serves no purpose and only adds to an already intricate procedural system.

A further problem created by Ricks is that many discrimination victims who attempted to file before Ricks was decided were unable to do so. In one case in our office, the employee was specifically told by the Department of Labor (which was at the time the responsible federal administrative agency) that he could not file because he had not yet been terminated, even though he knew of the decision to terminate him. Judicial justifications for tolling the time in such a case often are based on the question of whether the employee was represented by an attorney. Representation is irrelevant where the agency refuses to accept the complaint at all.

C. Underlying Policies

Most employees are unrepresented at the time of the discriminatory decision. Many are lulled into a false sense of security by lengthy separation packages. Others are afraid to file in the interim because they fear retaliation against them in the form of detrimental actions on their separation packages. An employee often tries to negotiate or obtain an explanation while the termination period runs. The very purpose of filing was to allow for conciliation, and yet the Supreme Court's interpretation actually punishes those who try to conciliate informally. Further, the act of filing forces the parties into increasingly public and adversarial roles.

D. Recommendation

Our recommendation is that Congress create a "last clear chance" doctrine. The dissents in both Ricks, supra (Stewart, J. and Stevens, J.), and Chandon, supra, (Stevens, J.) agree with this recommendation. In Ricks, the date of the decision to terminate was operative even though an informal grievance had been lodged and not yet ruled on. Under the "last clear chance" doctrine, the operative date is the date an employee actually ceases to perform services (termination) or the date another employee is selected for the position (promotion). This date "can normally be identified with the least difficulty or dispute." Ricks, 24 F.E.P. Cases at 833 (Stevens, J. dissenting). There will be increased certainty, less chance of retaliation, and more opportunity for informal negotiation. This will lead to decreased legal costs and court time before trial. Finally, employees will be less likely to lose their rights through inadvertent waiver by failing to file at the appropriate time. In this area, Congress can do the greatest good for everyone in any way affected by the ADEA.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT

-A SUMMATION-

The active caseload of ADEA cases in our firm consists of 20 cases. Seventy-five percent of this group were terminated under the age of 55. The average age of termination was 53.95 and the median age between 53-54. Because most pension plans do not allow a distribution prior to age 55 (and some plans not until age 65), these employees, almost without exception, are faced with survival on unemployment compensation for a few months and a greatly reduced pension benefit (if any). The average length of time from filing a federal complaint until the actual court date is two to four years in the 2nd circuit. To this, add rampant age discrimination in hiring and an unemployment rate higher than any since the Depression.

The large majority of our age cases are white male executives with twenty or more years of service with their employers. These discriminatory terminations result in economic and personal crises which the Age Act does not remedy as it is being interpreted by most courts. Most successful age discrimination litigants receive back pay awards, doubled if the violation is found to be willful, and reduced by any interim earnings including unemployment compensation.

Nationwide, reported cases show only twelve instances of court-ordered reinstatements over the past seventeen years.* Reasons given for not awarding reinstatement are: the employee was in a management or quasi-policy making position; the lawsuit has resulted in damaged employee/employer relations; and more recently, with the downturn of many businesses, the employer's reduction in force. So, although an employer cannot reduce its force in a discriminatory manner, the courts have used this to deny reinstatement.

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*BNA Fair Employment Practice Cases from enactment of ADEA in 1964 through the April 3, 1982 Supplement.

The courts have been even more reluctant to order front-pay, i.e., monetary relief from the court date forward. Only three cases in the country under the ADEA over the past 17 years were discovered in which front pay was ordered.* When neither reinstatement nor front pay is awarded, the employee is limited to back-pay relief, faces an extremely discouraging if not impossible job market and an average productive lifespan of twenty years. Liquidated damages goes only part of the way to remedy this discrimination. Without it, the remedy is meager indeed.

Because of judicial reluctance to order reinstatement or front pay (these types of relief are a rarity), the liquidated damages provision of the ADEA is essential, both as a remedy to the employee and as a deterrent to the employer. In many cases, employers would find it cheaper to blatantly discharge people at early retirement age or sooner. The employer's pension cost would be greatly reduced, both because of the reduced level of benefit due to the early age and the reduced benefit due to the lower salary than if the employee stayed until normal retirement age. And one must remember that the majority of pension benefits are offset (reduced by the amount of social security benefit the employee receives. Thus, if an employer can reduce its pension benefit enough, in some cases, the entire sum is covered by Social Security. The possibility of facing an order of doubled back pay when the violation of the ADEA is willful is the only effective deterrent to the employer. In fact, the legislative history of the Act shows that the double damage liability was a substitute for proposed criminal penalties.*

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*Ibid

The U.S. Supreme Court and Congress have mandated the right to a jury trial under the ADEA. Because of the wide discretion of the courts to deny reinstatement and front pay, to also deny employees the right to a jury trial on factual issues would seriously undermine the Act. Denying this right to a jury would affect issues such as willfulness for liquidated damages and discriminatory treatment in general. Also, please remember that this right is fundamental to the fairness of our judicial system. The fact that it is not in Title VII is unusual and, in fact, we would recommend that the right to a jury be added to Title VII.

Age discrimination is not determined by bigotry but by a myth that younger is better in addition to business money interests. All of us are subject to it in time. If one in also black or female, its effects are compounded.

While the average American's life span and period of productivity has been expanding, misunderstanding the effects of aging and industry's emphasis on youth have produced a class of functionless older Americans. The effect of such forced immobilization is felt not only by the marketplace which loses the use of experienced and productive workers, but by older workers who are convinced they have become useless. As Senator Pound stated:

> "I have long felt it is a particular tragedy to amputate a human being's function, to strip productive persons of their skills, cheating them

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*Senator Jacob K. Javits

> of the dignity of continued self-support. These are the consequences of forced retirement. It squeezes useful, healthy people out of the mainstream of society into a drab tributary on its fringe." 113 Cong. Rec. 31256 (1976).

We submit that the ADEA should remain undiluted for this very reason.

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September 10, 1982

In light of statements made by the Business Community Panel and of questions directed to those testifying, we wish to have the following included in the record regarding those issues raised at that time.

1. "Excessive" Verdicts

David Braithwaite of the National Association of Manufacturers cited the case of Goodman v. Heublein, Inc. 645 F.2d 127 (2d Cir. 1981) as an example of "large jury awards". This office represented the plaintiff in that case. The award, as reported, was $452,400; $226,200, in actual damages and $226,200, in liquidated damages. Actual damages were based solely on what the plaintiff lost - he was a Vice President who was unemployed for 4-1/2 years - in salary and benefits. "Wilfulness" was established beyond any doubt in that there was clear proof of the intentional destruction of corporate records relating to age discrimination. Thus, while the verdict was indeed "large", it was not "excessive". Further the size of the award would have had to have been exactly the same if the case were tried to a judge, once findings of wilfullness and age discrimination were made.

It should be noted that in every other "large jury award" case cited by Mr. Braithwaite, the jury award was affirmed by an appellate court. While the figures are indeed large, we submit that they are no more improper than the large verdicts found in wrongful death or malpractice actions. A plaintiff is entitled to his proven and allowable damages, and it is well settled law that a person with an "eggshell skull" or a large salary is entitled to as fair and reasonable a figure as one with a thick skull or a small salary. Thus, reliance on monetary figures alone is fallacious and improper.

2. Jury Confusion

David Braithwaite additionally cited cases where juries were reversed after delivering favorable verdicts to ADEA plaintiffs. Three comments should be made regarding erroneous jury verdicts. First, both parties are entitled to a fair and impartial jury, and the purpose of a jury voir dire is to remove potential jurors who are biased. The Business Panel has claimed that juries are plaintiff-oriented, but every defendant has a right to remove any juror that is so biased.

Second, it is the duty of the court to determine whether a jury should even hear a case. In all of the cases cited by Mr. Braithwaite, the jury should never have been allowed to make a verdict at all. Thus, arguing that juries deliver improper verdicts only addresses half of the problem - juries should only be allowed to decide cases within permissible limits set by judges. This is aptly demonstrated by the case of Stanojev v. Ebasco Services, Inc., 643 F.2d 914 (2d Cir. 1981) which Mr. Braithwaite cited.

Finally it is the duty of both parties and the judge to give the jury reasonable instructions upon which to base a verdict. A jury is made up of people untrained in legal reasoning, and it must be given thorough guidance. As stated above, the jury cannot be held accountable for the entire problem: attorneys and judges have a duty to create a road map along which a jury must travel, with no possible difference of opinion once the facts are found.

The right to a jury of one's peers is one of the foundations of our judicial system. It is rarely limited, even in some of the most complex litigation in the history of the United States. Despite criticism, a jury's function has been maintained, not only for the benefit of the individual litigants but for the protection of society as a whole.

The complaint of jury prejudice has actually switched from plaintiffs to defendants in discrimination cases. Curtis v. Loether, 415 U.S. - , 39 L.Ed. 2d 260 ( ), decided the issue of jury trials under Title VIII. In Curtis, the black female plaintiff claimed she was discriminated against in housing because of her race, and the defendant landlord requested a jury trial. In upholding the jury trial right, Mr. Justice Marshall noted that:

> We recognize, too, the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled. Of course, the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or to grant a new trial provides substantial protection against this risk, and respondent's (landlord's) suggestion that jury trials will expose a broader segment of the populace to the example of the federal civil rights laws in operation has some force. More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment. 39 L.Ed. 2d at 269 (emphasis added, citation omitted).

For exactly the same reasons previously urged by landlords and employers, we submit that the right to trial by jury must be maintained.

3. Liquidated Damages and Settlements

Senator Quayle questioned the Business Community Panel regarding percentages of settlements of ADEA cases and the effect of liquidated damages on the possibility of settlement. The experience of our office has been that settlements are not unduly hampered by the possibility of liquidated damages. In only one settlement were liquidated damages agreed to above and beyond actual costs; in that case, there was unrebuttable evidence of purposeful age discrimination. In fact, the option of liquidated damages has actually aided us in settling ADEA cases rather than hindered us, since a settlement can be structured so as to make some of the dollar award liquidated (non-taxable) rather than all actual (taxable) damages. In this way, plaintiffs often will accept a smaller figure if more of it goes into their pockets, and defendants are actually paying less money.

One reason that plaintiffs in ADEA actions seem less agreeable to settlements than those in other discrimination actions is that, unlike Title VII plaintiffs, they are becoming less employable over time and are more in need of vindication. Often, age discrimination victims have put in many years of service for the defendant employer, only to be terminated for non-performance. They are thus faced with a double handicap - unemployability based on age and the lack of a job reference from the employer with whom they have spent their most productive years. Under such circumstances, plaintiffs often feel that the only way they will be able to join the work force again will be to show publicly that they performed well and that they are still capable of performing for someone else. A so-called neutral reference simply is not good enough when it covers many years and actually hinders further employment.

It should be emphasized that Congress provided for liquidated damages not as a vast and sweeping new weapon in and of itself, but rather as a compromise - the original proposed remedy was a criminal penalty. To suggest removal of liquidated damages from the ADEA flies in the face of the history of the Act and its intended purpose.

Moreover, if an employer does not discriminate there is no need to worry about liquidated damages. It is a ludicrous position taken by the business community that they only deserve one slap on the hand rather than two if it is proven that an illegal act was done.

The way to lessen damages is to be non-discriminatory; lessening the liability for actual discrimination only solicits further discrimination.

4. The Number of ADEA Cases

Senator Quayle was concerned with the number of ADEA cases currently on file and their increase relative to Title VII cases. This can be attributed to several factors. First, there is increasing public awareness of the ADEA and its provisions. As more people become informed of its protections, more people who believe they are being discriminated against will avail themselves of the judicial process. Second, in this time of economic unrest, discrimination is much more likely to occur. This is particularly true with respect to age - "cost reduction" plans have a disparate impact on older workers with higher salaries.

Finally, there is an inherent difference between Title VII and the ADEA, which skews the statistics. Title VII allows for class actions, and more often than not there are multiple plaintiffs in a Title VII case. The ADEA, however, primarily allows for individual actions and only rarely has opt-in additional plaintiffs. Thus, the relative number of plaintiffs under the ADEA may be much closer to the number under Title VII, while the number of lawsuits may be greater.

5. General Observations

Age discrimination, like any other form of discrimination, is distasteful because it is unrelated to any valid or rational criteria of performance. However, age discrimination is more insidious because its effects are compounded over time. Not only does the individual suffer, but the nation and the market place suffer as well from "economically dead" but still productive and experienced members of society. A strong statute of prevention is worth more than a multi-million dollar verdict of cure; only with the protections at least as strong as they now stand will it make discrimination too much of a risk for an employer to take. To remove those protections at this time would be to tacitly encourage further harm.

Igor I. Sikorsky, Jr.

David Eite Waters

Diane M. Atkins

Senator NICKLES. Thank you.

Mr. Hacking?

Mr. HACKING. Thank you, Mr. Chairman. With the association's statement included in the record, I would like to summarize.

As an organization that represents well over 13 million older persons, I am sure you can expect that we are fully and enthusiastically supportive of S. 2617. We would like the subcommittee to act on this bill favorably and soon.

The bill would insure that virtually all workers will have the opportunity to compete for employment and promotions without the imposition of arbitrary age barriers. It will not force employers to take the unfit or the incompetent. It will merely require that individual merit and capacity to work be the only criteria in employment and promotion decisions.

While we thus urge the subcommittee to act favorably on this bill, we would hope that you would also consider improvements, that go beyond its scope.

Due to the concern that there could be cost differences in employee benefit plans associated with employing older workers, Congress included in the ADEA a section which allows for cost differences to be reflected in those plans. While this section is designed to prevent employers from incurring greater costs in hiring older workers, it has also been interpreted to allow a substantial windfall to employers who retain workers beyond their pension plan's normal retirement age.

The Department of Labor's interpretive bulletin on the 1978 ADEA amendments permits employers to freeze the pension benefits of employees who work beyond their plan's normal retirement age. Thus, employers can provide less compensation for older workers by not contributing to the plan on their behalf.

Moreover, by suspending payment of the pension while a person is employed and by failing to provide an actuarial increase when retirement occurs, the employer can eventually pay a pension that is of significantly less value to the person who stays on the job beyond the plan's normal retirement age.

We would hope the subcommittee would favorably consider extending S. 2617 to reverse the current practice of freezing pension benefit accruals.

I would also like to comment briefly on the suggestions we have heard today that the liquidated damage and jury trial features of the ADEA be scaled back. The ADEA's liquidated damages provision was included so as to provide full, compensatory relief for losses that are too obscure or difficult to estimate.

Not only does it tend to assure the discriminated-against employee will be made whole again, but it also serves as an effective deterrent to the willful violation of the act. We feel very strongly that this feature should be retained.

As far as the right to a jury trial is concerned, we feel it, too, should be retained because the ADEA creates many questions of fact—facts that should properly be determined by a jury.

In conclusion, I would like to reiterate that AARP fully supports S. 2617 as it is. However, if it turns out that all that will be legislatively possible at the present time is basically what Secretary Lovell outlined earlier, AARP will be fully supportive of that. It certainly is not all that we would want, but we will take it if we can get it.

I would, however, caution the subcommittee that if, in marking up legislation, you begin to add on things, like the elimination of jury trials and other features like that, such actions would very likely push AARP from a position of support into a position of neutrality or even opposition.

As you know, Senator, we are working with your subcommittee, very constructively in a number of other areas. We certainly hope that on this matter, we will be able to continue to work in that same manner. Thank you.

[The prepared statement of Mr. Hacking follows:]

STATEMENT

of the

AMERICAN ASSOCIATION OF RETIRED PERSONS

on

S. 2617
The Prohibition of Mandatory Retirement
and Employment Rights Act of 1982

before the

SUBCOMMITTEE ON LABOR
of the
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

August 18, 1982

I. Introduction

The American Association of Retired Persons appreciates the opportunity to testify before the Senate Subcommittee on Labor on S. 2617, the "Prohibition of Mandatory Retirement and Employment Rights Act of 1982." The Association strongly supports this legislation, and we urge the Subcommittee to act favorably on it. Enactment of S. 2617 will ensure most older persons that they will not be retired from, or discriminated against in, the work force solely on the basis of age.

While age discrimination is still embedded in society and in the job market, a good deal of progress has been made. An indication of the positive attitude Americans have regarding older workers can be seen in the results of a 1981 Harris survey. These findings indicate that nearly nine out of ten Americans agreed that "nobody should be forced to retire because of age if he wants to continue working and is still able to do a good job."

Fortunately, many older workers have had the protection of federal law, the Age Discrimination in Employment Act (ADEA), to keep employers from making employment decisions based solely on age. The ADEA, which was passed in 1967and amended in 1978, generally prevents employers from discriminating against workers, age 40 to 70, because of their age. Most federal workers are not subject to the age 70 cap. A number of states have passed laws to remove the age cap for workers in those states. S. 2617 is the natural extension of this trend, and it is an accurate response to the desire of the public to rid the work force of age discrimination.

II. Why Passage of S. 2617 Is Necessary

A. Mandatory Retirement Denies An Older Person Basic Civil Rights

The Association believes that a basic tenet of employment discrimination law is that each individual worker should be judged on the basis of ability. The existence of a policy of forced retirement due to age severely violates this approach. The person affected by a mandatory retirement policy has no chance to prove his/her worth in the labor market. An irrebuttable presumption is made that, due to age, a worker is inherently incapable of performing his/her responsibilities. This presumption, as applied to many older persons, simply is not true. Research proves that chronological age can not be accurately used to predict job performance (see, e.g., 88 Yale L.J. 565 (1979)).

S. 2617 will ensure that all workers have the opportunity to compete for employment and promotions without the imposition of arbitrary age barriers. This bill will not force employers to take the unfit; it will merely require that individual merit and capacity to work be the only criteria in employment decisions.

B. A Policy Imposing Mandatory Retirement Is Not Economically Justifiable

Forced retirement based on age deprives the affected individual, the individual's employer, and the general economy of valuable resources. While the costs are enormous, the benefits from allowing employers to make arbitrary age-based decisions regarding their older work force are virtually nonexistent.

Mandatory retirement denies the affected individual access to an important source of income-wages. Many older people must work to survive financially. The elderly cannot live on social security alone and, as members of this Subcommittee know, the private pension system cannot presently be relied upon to provide benefits to a broad segment of the elderly population. Even for those people for whom wage income is not economically essential, maintaining a job could be crucial for mental and physical well-being.

An employer who enforces a mandatory retirement policy deprives himself of productive and loyal workers. As we stated earlier, studies prove that age cannot be directly related to ability. If employers were to rid themselves of the incorrect notion that older workers are less productive, they would be benefited.

The elimination of mandatory retirement would also aid the economy by producing more tax revenues (including payroll taxes) and by decreasing the elderly's reliance on government support programs. Additionally, because older workers are often very productive workers, national productivity could be increased. All of these gains can be achieved simply by allowing people to help themselves by working.

While extension of the ADEA in 1978 was extremely helpful to older workers in thousands of individual cases, the Department of Labor has found the immediate effect of the 1978 Amendments on younger, female and minority workers to be marginal. The additional age-65 workers are potential competition for less than one-fourth of one percent of all full-time workers age 16-24; less than one-half of one percent of all full-time black workers ages 16-59; and one-tenth of one percent of all full-time women workers age 16-59. Furthermore, the studies indicate the increase in labor force competition that would result from uncapping the ADEA would have virtually no effect on limiting the upward mobility of younger employees.

III. Improvements Are Needed in the ADEA Beyond S. 2617

A. Older Workers Should Be Able To Accrue Additional Pension Benefits

In enacting the ADEA, Congress tried to provide fair treatment for the older worker and, at the same time, it made sure it did not place any burdens on employers. Due to the concern that there could be cost differences in employee benefit plans associated with employing older workers, Congress enacted a section (29 U.S.C. § 623(f)(2)) which allows for cost differences to be reflected in employee benefit plans which are "not a subterfuge to evade the purposes of this Chapter."

While this section is designed to prevent employers from incurring greater costs in hiring older workers, it has also been interpreted to allow a substantial windfall to employers who retain workers beyond their pension plan's normal retirement age. The Department of Labor's Interpretive Bulletin on the 1978 Amendments, which has been upheld by the Equal Employment Opportunity Commission's regulations (29 CFR 860.120), permits employers to freeze the pension benefits of employees who work beyond their plan's normal retirement age. Over fifty percent of all employers who maintain plans freeze the pension benefit at normal retirement age, and larger corporations are most likely to do this.

Through this interpretation employers receive a windfall in two respects. First, they provide less compensation for older workers by not contributing to the plan on their behalf. Second, by suspending payment of the pension while the person is employed and by failing to provide an actuarial increase when retirement occurs, the employer will eventually pay a pension that is of significantly less value to the person who stays beyond a plan's normal retirement age. On the other hand, a person who continues to work beyond normal retirement age because he/she cannot afford to retire will unfortunately find that retirement will always be unaffordable because the pension owed to him/her will never increase.

Not only is the failure to accrue pension benefits inequitable to the older worker and a windfall to the employer, but it creates a perverse incentive to retire. Because the efficient use of resources dictates that policy be designed to encourage people to continue to work, the Association urges the Subcommittee to enact legislation which reverses the current practice of freezing pension benefit accruals.

B. The Statutory Exemptions To The ADEA Should Be Carefully Reviewed And Limited

The ADEA provides that mandatory retirement is allowable under certain specified circumstances. For example, where age is a "bona fide occupational qualification" (29 U.S.C. § 623(f)(1)) or where the individual is in a "bona fide executive or high policy-making position" (29 U.S.C. § 631(c)(1)), a retirement policy based on age can be pursued.

Because of the harmful nature of mandatory retirement, any exception to the ADEA must be limited and carefully reviewed to be certain it is necessary. For example, the scientific community can help determine whether the holders of some hazardous jobs can be tested individually rather than discriminated against as a class. The Association believes that this Subcommittee should request the Department of Labor and other expert agencies and organizations to continually search for ways to make mandatory retirement as unobtrusive as possible.

IV. The Procedural Safeguards Contained In The ADEA Should Be Maintained

The Association would also like to briefly comment on suggestions we have heard that some of the procedural safeguards of the ADEA be scaled back. In our view, these safeguards have been carefully designed and should not be eliminated absent a very clear showing of their burdens. We have not seen anything to date which even resembles such a showing.

Because the ADEA is designed to afford older Americans similar protection against employment discrimination which Title VII extends to minorities and women, the Act's substantive provisions are patterned after Title VII (with exceptions). However, its enforcement provisions incorporate the procedures provided in the Fair Labor Standards Act. Although it is argued that the remedial provisions of the ADEA and Title VII should be the same, there are important considerations which justify the additional protections provided by the ADEA.

The ADEA's liquidated damages provision is integral to [illegible] potency. The Conference Committee Report for the 1978 [illegible] reveals that the provision was included so as to provide full compensatory relief for losses that are too obscure or difficult to estimate. Not only does it make the discriminated-against employee whole again, but it also serves as an effective deterrent to the willful violation of the Act.

Before the 1978 Amendments were enacted, the Supreme Court upheld the right to a jury trial in ADEA suits. Later that year, Congress affirmed that right through legislation. The Conference Report states, "Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury."

The special character of the Act does indeed demand that a charge of age discrimination be heard by a jury. Not all employment practices which have a discriminatory age-based result violate the Act. There are four statutory qualifications: (1) bona fide occupational qualifications; (2) differentiations based on reasonable factors other than age; (3) bona fide seniority system or bona fide benefit plan which is not a subterfuge to evade the purposes of the Act; and (4) discharge or other discipline for good cause. Bona fide executives or high policy-makers are also exempted from protection. Thus, the Act, unlike Title VII, creates many questions of fact; facts that should properly be determined by a jury.

Senator NICKLES. I appreciate that, and I also appreciate the assistance and cooperation that you have shown in the past in working with our committee on this as well as other issues, and that would apply for the other individuals, too.

There are several questions I would like to ask.

I was interested in your father, Mr. Sikorsky; that is kind of an interesting story. Was he able to come back? Did they reemploy him as a consultant?

Mr. SIKORSKY. No. What happened was he went back as a consultant, and what he developed was the crane, which is that thing that lifts——

Senator NICKLES. They were able to get around it?

Mr. SIKORSKY. I want the Senator to know that, in truth, they did, in this instance, break or bend or get around by getting him in as a consultant. But, actually, he was not an employee. He came back there on a per diem basis. Actually, he would have come back for anything to work on helicopters.

But, truthfully, he was retired, and there was absolutely nothing the company would or could do.

Senator NICKLES. They had a prohibition that said mandatory retirement?

Mr. SIKORSKY. That is right.

Senator NICKLES. I think, Mr. Howard, you said that three-eighths of the major companies do not have any mandatory retirement provisions?

Mr. HOWARD. That is correct, Mr. Chairman.

Senator NICKLES. Does that mean that five-eighths do?

Mr. HOWARD. That is right.

Senator NICKLES. In those five-eighths, do they not make exceptions?

Mr. HOWARD. Many do, as a matter of fact. In fact, almost all of the major corporations have plans that allow them to make exceptions as they choose.

Senator NICKLES. Even though they may have a collective bargaining agreement—well, the terminology that has been used is "mandatory retirement." In many cases, the employer will maintain the employment of an employee if it is mutually desirable?

Mr. HOWARD. That is right. The only difference is in those cases it is only the employer who has the option. In other words, it takes two people in that situation.

Senator NICKLES. It takes two people to work.

Mr. HOWARD. That is right, and if the only reason that the employer wants to not make an exception, if you will, is because that person is 70 years of age, that is the end of the inquiry, even if it is the most productive employee they have.

Senator NICKLES. What about the collective bargaining agreement that says age 70? If the cap was lifted, would we go in and make them renegotiate all those collective-bargaining agreements?

Mr. HOWARD. Senator, I thought that the device that was used in 1978 was a pretty good one, and that was there was an adjustment time during which collective-bargaining agreements either could be adjusted—and most of them really are not a problem—or they would expire and the new agreement would have the new law in it.

Senator NICKLES. They would allow that particular agreement to expire under their terms, if they had a 1-, 2-, or 3-year contract, or whatever it may be, and the subsequent contracts would have to reflect the change in the law, correct?

Mr. HOWARD. Depending on how long that period was, yes.

Senator NICKLES. Gentlemen, thank you very, very much for your statements; also, my apology for the fact that we have had so many votes and interruptions today.

Mr. WATERS. Senator, could I request that the record remain open so that we can address some of the other issues in writing?

Senator NICKLES. The record will be open for 30 days and we will request that you address some of our questions also. You may be able to slide in some other information from our questions.

Mr. WATERS. Thank you, sir.

Mr. HOWARD. Thank you.

Senator NICKLES. Thank you.

Our next and final guest today is Prof. John Dunlop from the Harvard University Law School in Cambridge, Mass., representing the American Association of University Professors, the American Council on Education, the Association of American Universities, and the National Association of Independent Colleges and Universities.

Mr. Dunlop, you are representing the entire realm of the academic field on tenure. We appreciate your statement, and also the opportunity for me to meet with you personally and discuss this legislation.

STATEMENT OF JOHN T. DUNLOP, LAMONT UNIVERSITY PROFESSOR, HARVARD UNIVERSITY SCHOOL OF LAW, CAMBRIDGE, MASS., REPRESENTING THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN COLLEGES, THE ASSOCIATION OF AMERICAN UNIVERSITIES, AND THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES

Dr. DUNLOP. Thank you very much, Mr. Chairman. I appreciate this opportunity to again appear before this committee. I am very conscious of the fact that I am the only thing standing between you and lunch, and I will try to be quite brief.

Senator NICKLES. Thank you.

Dr. DUNLOP. I have submitted a statement which I would like to have placed in the record, since I will not read it. In addition, I have two sets of statistical material which I file because I take seriously the notion that we need to look at the facts in this particular area. And these statements go to the age distributions and to the projections of the demands for tenured professors into the next century.

Let me start by saying that my experience teaches me to be sensitive to the range of issues because they are important to individuals, to their families, to management, as well as to employees who are looking for jobs, and particularly those concerned with equal employment opportunity—women and minorities.

My testimony is directed solely to the question of the proposed exception for tenured faculty and administrators in higher education, and to no other part of this legislation.

Mr. Chairman, I think I can say there are probably five things I would like to leave with you, and let me just tick them off very quickly.

The first is that because of the very rapid expansion in higher education in the 1950's and 1960's, a great many younger tenured professors were added to the payrolls of our universities in this country, and they will not reach their retirement age until the 1990's and beyond. So, we have with us a residue of that period of expansion.

The age distribution is shown on page 16 of the attached statistical information. That demography is coupled with the fact—well known—that the number of students in our universities, graduate and undergraduate, is likely to go down through the course of the 1980's and reach a low point in the middle 1990's.

As page 20 of this document shows, then there will be a demand for tenured faculty each year for no more than 4 or 5,000 a year, compared to 16 or 17,000 around 1980. So, we have both a continuation of the large number who were put on the payrolls in the 1950's and 1960's combined with a period of extraordinary decline in the age group and the inuniversity enrollment projected.

Now, there are two groups who are particularly dependent on a reasonable availability of faculty openings. One are those young people who are now in graduate school, looking forward to tenured appointments; and, two women and members of minority groups who can join faculties in increased numbers only if positions are available. That is the first point I make.

The second problem that I would like to leave with you is that a university community—and I have spent my whole life there, most of the time, and occasionally in this city—is a community in which it is highly desirable to have a proper mix of young faculty and older faculty.

Disciplines are changing a great deal. I do not feel as comfortable with computer technology in economics as my young colleagues do. Yet, the discipline has moved very much into mathematical models. So, I ought to be replaced at some point soon with some younger person with those skills and familiarities.

The same thing is true throughout learning and throughout science and technology.

Senator NICKLES. I will let you change that for the record if you want to.

Dr. DUNLOP. No. I do not have any concerns about that, Mr. Chairman.

So, we need to create opportunities for employment for younger persons to keep the country productive. I happen to think it is just as important to be concerned with the productivity of basic science and university research as it is in the business community with the top levels of leadership.

As an example of my concern, I cite in the paper that at Harvard we think pretty well of "summas." They are more selective than the top 1 percent of the graduating class. Fifteen years ago, 80 percent of them went on to do research and teaching. Today, that figure is below 30 percent. So, the leaving, because of job opportunities and so on, of the brightest and most intellectually able people is a heavy burden for not only the academic community but for the country as well.

Third, I am perhaps most concerned about the impact of any mandatory retirement age on tenure. Tenure is a system of appointment in our faculties which grew out of a deep concern over academic freedom and the expression of views in research activities and in writings and in extramural activities.

Without a stipulated retirement age, tenure would, in effect, provide for continued employment indefinitely, since an important feature of the present system is that tenured faculty members cannot be removed except under the most severely restricted conditions.

You may say you wish it were not so, but it is indigenous to the concept of academic freedom. And when you protect against the possibility of discrimination on grounds of views or dress or activities or deviant behaviors of one kind or another, you make it very difficult to separate people for the reason that you do not think they are doing the most optimum job.

In that situation, therefore, the extension of the retirement age to 70 from 65 extended tenure. So, the indefinite extension of retirement would extend tenure for a lifetime. Under that circumstance, for an institution of higher education to provide tenure only to age 70 and an opportunity for employment unrestrained by tenure above 70 would create a latent form of discrimination on the basis of age.

A professor of 69 would have tenure and one just over 70 would not have tenure. But tenure and academic freedom have been very deeply and emotionally intertwined over the years.

Now, I will leave the statement to speak for itself. The fourth point I want to make is that the act of 1978, as you know, provided for a temporary exemption which expired on June 30, 1982. And as Mr. Lovell said, there is really no experience on that, but I want to emphasize that the proposal to uncap it is a vastly more drastic piece of action than the previous one, because a lot of faculties used to be at 70—my own, for example. And uncapping would provide essentially lifetime employment for many. How many, no one really knows, and that is one of the things the study ought to look at.

Now, Mr. Chairman, I would also like to emphasize that the record in various States is really not as it has sometimes been portrayed. My information is that in Tennessee, for example, it exempts schoolteachers in public schools and college and university personnel. In Vermont, faculty are excluded. In Connecticut, there is an exclusion for all of higher education. In Iowa, you only uncap for those in public retirement systems, and most people are in private retirement systems.

Finally, Mr. Chairman, I close with a point related to my normal occupation I mediate and help to solve problems with labor and management. And the list of associations that you read at the start of this testimony are really both the faculty and the institutions in higher education, and I therefore have the privilege of representing, in effect, both labor and management.

In my view, when labor and management are in full agreement on a proposal, I believe that fact should be given very serious consideration in the deliberations of the Congress. Thank you.

[The prepared statement of Mr. Dunlop follows:]

TESTIMONY
TO THE
SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

AUGUST 18, 1982

PRESENTED BY

JOHN T. DUNLOP
LAMONT UNIVERSITY PROFESSOR
HARVARD UNIVERSITY

ON BEHALF OF:

American Association of University Professors
American Council on Education
Association of American Colleges
Association of American Universities
National Association of Independent Colleges and Universities

Mr. Chairman and Members of the Subcommittee:

I very much appreciate this opportunity to appear again before members of the Senate Committee on Labor and Human Resources.

President Derek C. Bok of Harvard University, Chairman of the Board of Directors of the American Council on Education, and President William G. Bowen of Princeton University, past Chairman, asked me to present my views on behalf of the Council. Irving J. Spitzberg, Jr., General Secretary of the American Association of University Professors has also endorsed my statement. Incidentally, I have been a member of the AAUP since the 1950's. In addition, the Association of American Colleges, the Association of American Universities and the National Association of Independent Colleges and Universities have also endorsed my statement.

Briefly, I came to Harvard University as a teaching fellow in 1938, was granted tenure in 1945, served as chairman of the Department of Economics, 1961-66 and Dean of the Faculty of Arts and Sciences, 1970-73, before taking leave to serve as Director of the Cost of Living Council under President Nixon and Secretary of Labor under President Ford. Should anyone regard the fact as material in this presentation, I had my 68th birthday in July, and I am in good health. I continue as Lamont University Professor at Harvard and chairman of numerous joint labor-management and health care committees.

My experience teaches an appreciation of the sensitivity to rules relating to retirement on the part of individual employees, their families, managements and their institutions, as well as potential employees looking forward to job opportunities, including the equal employment opportunity concerns of minorities and women. Experience also makes one aware of differentiations and discriminations according to age in the employment relationship. This sensitivity has been made more delicate over recent years by rapid inflation eroding pay and retirement benefits, by a decade of relatively stagnant real rates of wages and salaries, by concerns over unemployment and rising medical care costs, and uncertainties over public policies relating to social security and medicare. These questions also have implications for productivity and economic growth. These complex issues need to be approached with a special resolve and dispassion to get at the facts.

My testimony is not directed to the full scope of S. 2617, which would eliminate mandatory retirement at any age, except in the case of certain business executives. This testimony, rather, urges that any legislation broadly uncapping the mandatory retirement age exempt permanently from its provisions tenured faculty members and tenured administrators in higher educaton.

I invite your attention to four major considerations*:

1. Demographic Changes in Higher Education. In the absence of mandatory retirement, the number of job openings and opportunities for advancement for able young persons, already scarce for demographic reasons, would be much reduced. As a result of the very rapid expansion in higher education in the 1950's and 1960's, there is a bulge of faculty members now in their fifties who will not -- even under current law -- be retiring before close to the end of

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* The formulation of the first two points below relies substantially on President Bowen. See, Report of the President, Graduate Education in the Arts and Sciences: Prospects for the Future, April 1981, pp. 11-28. Also see, "The Long-Run Academic Labor Market Outlook," in Academe, July-August, 1982, Annual Report on the Economic Status of the Profession, 1981-82, by Professor W. Lee Hansen, pp. 6-8.

this century. This factor, when combined with the reductions in enrollments now beginning as the size of the college-age population declines substantially, has already resulted in a situation where most new faculty openings will occur either through death or retirement.

No other sector of the economy must adjust to such an extreme demographic model. Most projections of enrollment anticipate an overall decline of 15 percent in full-time equivalent students between 1981 and 1996 -- as high as 30 percent in some sections of the country. Even assuming an age 70 retirement, projections suggest that there may be only about 100,000 academic positions to be filled nationally during the entire 15 year period from 1980-1995. This compares with about 60,000 positions in just five years from 1971-1975, already generally regarding as a "lean" period.

Two groups are particularly dependent on a reasonable availability of faculty openings -- many of which would, in effect, be eliminated by current retirement proposals: (1) those individuals who have entered graduate schools recently or who are now junior faculty members or administrators; and (2) women and members of minority groups, who can join faculties in increased numbers only if positions are available.

2. Need to attract new skills and developing disciplines. Colleges and universities must have a healthy representation of relatively new faculty members if they are to continue to be effective centers of teaching, learning, and scholarship. In some fields (mathematics is a particulary good example), the major contributions of an individual often are made toward the beginning of a career. And in all fields one needs a balance of younger and more experienced faculty to stimulate students and colleagues alike by challenging old as

well as new ways of thinking and by contributing varied perspectives. Unless a sufficient number of faculty positions continues to be available for new appointments -- and they are reduced by extending the retirement age -- we run the risk of creating a static situation for nearly two decades ahead. Demography combined with further advancing the age of retirement create a serious "graying" of the faculty.

As new methods and tools for scientific research are developed and as new subjects and fields are opened, we need to attract the brightest of the young men and women as scholars to these fields. A bright future for learning and basic science in our country demands it. Fifteen years ago, 80 percent of Harvard College _Summas_ went on to the Ph.D. and to research and teaching. Today, no more than 30 percent of this group do so. The additional curtailment of tenure opportunities will further restrict the attraction of the most able and creative minds of the generation to science and learning and to the academic community.

3. _Elimination of any mandatory retirement age would have serious consequences for tenure_. Tenure is a system of appointment of faculty and administrators in our colleges and universities which grew out of a deep concern over academic freedom and the expression of views, in research activity and writing and in extramural activities. In the absence of tenure, unpopular and controversial views have led to discharge, discipline or discrimination, including premature retirement. The joint AAUP/AAC statements on retirement over the years have called for a "fixed and relatively late retirement age, the same for teachers and administrators." In 1968 the AAUP/AAC Report on Retirement and Academic Freedom stated "in the present circumstances the desirable

fixed retirement age would appear to be from 67 to 70*."

Without a stipulated retirement age, tenure would in effect provide continued employment indefinitely, since an important feature of the present system is that tenured faculty members cannot be removed except under the most severely restricted conditions. Tenure protects against dismissals allegedly based on grounds of "incompetence" or "misconduct" that may in fact be motivated in some degree by disagreements or personal antagonisms. Moreover, the process of performance evaluation in other industries poses unique problems in higher education, in part because teaching, research and academic administration are such highly individualistic and independent activities, carried out in large measure on the basis of each person's own sense of what is the right way to proceed.

Just as the extension of the retirement age to 70 from 65 extended tenure, so the indefinite extension of retirement would extend tenure for a lifetime. Under that circumstance, for an institution of higher education to provide tenure only to age 70 and an opportunity for employment unrestrained by retirement above 70 would create a blatant form of discrimination on the basis of age: a professor at age 69 would have tenure, and one just over 70 would have no tenure. Tenure and academic freedom have been deeply intertwined in higher education.

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* AAUP, "Statement of Principles on Academic Retirement and Insurance Plans," AAUP Bulletin, Autumn 1969, pp. 386-87.

Under the current legislative proposal, colleges and universities would be faced with two very undesirable options: (1) They could elect to keep the tenure system as it now functions essentially intact, with the result that individuals would have the assurance of continued employment, in effect for life -- with harmful effects on education, on the advancement of new faculty members and on the academic enterprise as a whole. (2) They could seek to eliminate tenure altogether, or to alter the tenure system in some substantive way, with chilling effects on academic freedom as we have understood it and, consequently, on teaching, faculty and administrative morale and the long-term advancement of knowledge. A stipulated mandatory retirement age has the important advantage of allowing institutions to achieve the positive purposes which tenure provides while simultaneously assuring some regular degree of turnover, particularly given the demography of the 1980's and the first half of the 1990's.

4. Appraisal period. The Age Discrimination in Employment Act Amendments of 1978, which raised the permissable mandatory retirement age generally from 65 to 70, included a temporary exemption for tenured personnel at colleges and universities that expired on June 30, 1982. The concerns that led to that exemption seem to me to have been exacerbated over recent years by the more difficult financial problems and the declines, and projected declines, in enrollment in higher education.

The shift to a permissable mandatory age of 70 years on July 1, 1982 has provided little experience as yet to evaluate the change. Moreover, the complete elimination of any mandatory retirement age whatsoever has far greater implications than raising the age by five years, serious as that step was for some institutions.

Under Secretary of Labor Lovell in his testimony before the Select Committee on Aging of the House of Representatives on July 16, 1982 recognized this absence of data and experience and said, "it is very difficult to project what the total elimination of the 'cap' would mean for the academic community. In any case, we believe this special situation still exists and should be carefully reviewed in the light of the recent expiration of the age 65 'cap.'"

In view of the basic demographic decline in students from now to 1995, magnified in some regions, with the age distribution of existing personnel and strong pressures to reduce the number of tenured appointments, and with the intellectual and scientific necessity for a mix of younger scholars, and the fundamental constraints and values of tenure, it would seem imprudent to legislate now, without a careful appraisal of the change to age 70, still more drastic changes in the retirement rules for tenured faculty and tenured administrators.

One closing point: At the outset I indicated that several associations, representing higher education institutions, and the American Association of University Professors, representing faculty, were in agreement in seeking a permanent exemption from an uncapping of the mandatory retirement age for tenured faculty and tenured administrators. In other industries I would say simply that labor and management are in agreement on this proposal. I believe this fact should be a serious consideration in the deliberations of the Congress.

I shall be glad, Mr. Chairman, to answer any questions you and members of the Subcommittee may have.

Senator **Nickles**. Thank you.

Mr. Dunlop, the exemption has expired, so how much problem will that cause you or your associations of faculties, and so on, where you move from 65, say, to 70, if it were to be reinstated, say, at 70?

Dr. **Dunlop**. I am not sure I could speak officially to that. My own reaction, Mr. Chairman, is that what I have come to urge is a maintenance of the present situation, which is 70.

Senator **Nickles**. The present situation would be 70?

Dr. **Dunlop**. Seventy, and I am not here to seek a change in that. I am quite content, personally, to see that retained. What I am personally also rather strong about is it seems to me that the Under Secretary has well said that there are not very many data available.

My view is that the present situation, 70, should be maintained while an appropriate study commission went thoroughly into all these matters.

Senator **Nickles**. How many years does it take in the average large university to become a tenured professor?

Dr. **Dunlop**. Well, it varies somewhat. The normal rule, I believe, is that assistant professors or associate professors without tenure are reviewed roughly 7 years after they have completed the Ph. D. degree. At that point, the decision is made on tenure.

Senator **Nickles**. If there were no cap whatsoever, do you think you would see a major change in the tenure policies of universities across the country?

Dr. **Dunlop**. I am not sure I know what that means. There are a few institutions, Mr. Chairman, who have gone for entirely term appointments, 5 years at a crack, but they are very, very few. And I certainly would not recommend that; I cannot conceive of our major institutions doing that.

Senator **Nickles**. But you would be talking about some change or pressure for change so you would not have a lifetime, guaranteed——

Dr. **Dunlop**. The impression I want to leave with you is I think that is an extremely difficult matter and I am not sure it can be done, for the following reason. I do not think you can treat people—discharge them or separate them for reasons that are different below 70 than you would treat them after 70.

If you say, "Doing this below 70, you are protected by tenure, and above 70 we can now get rid of you because we do not think you have done a good enough job"—my testimony says that the measurement of performance in the academic world is not the same kind of thing as the measurement in the business world.

I am a member of the board of directors of a company. I have been in the business of approving performance bonuses for executives, as chairman of its executive compensation committee. We do that all the time. But in the academic world, I believe that is inappropriate. Research is very much a matter of individual initiative and of insights, and instead of trying to put those up to disciplinary tests, we need, if anything, to free the spirit to get the research and development that the country needs.

Senator **Nickles**. Mr. Dunlop, I very much appreciate your input. I have a page of questions that I would like to submit to you for the record. Again, I will apologize for the necessity to have two or three interruptions today.

We will keep the record open for the next 30 days to receive some input and additional comments.

At this point I order printed all statements of those who could not attend and other pertinent material submitted for the record.

[The material referred to follows:]

President Ronald Reagan
The Whitehouse
1600 Pennsylvania Ave.,
Washington, D.C. 20500

July 28, 1982

Dear Mr. President:

This letter is in reference to the Age Discrimination Act of 1967. As you know, S. 2617, "To Amend the Age Discrimination in Employment Act of 1967..." is now in Committee.

I am interested because I have just been told, by the University of Virginia, that when I reach 70 years of age, I cannot any longer teach for them. I have been teaching a very successful Humanities Seminar for them for 19 years. Included in this Seminar have been famous and talented people like Richard Coe, the Drama Critic, Davey Marlin Jones, and a whole host of artists, dancers, actors, musicians, poets, writers.

I am sure you must think it ridiculous that, at 71, you can lead a country of over 200 million people, but I can't lead 50 adult teachers for the University!

My mental faculties remain sharp, and my physical condition is such that I hereby challenge you to a 50 yard dash on the Whitehouse lawn!

I am sure you are also aware that many talented artists, over 70, are still active and creating:

- Arthur Rubenstein - 92 yrs.
- Martha Graham - 87
- George Burns - 85
- Fred Astaire - 82
- Helen Hayes - 82
- Elsa Lancaster - 80
- Vladmir Horowitz - 78
- Mary Martin - 71
- Ronald Reagan - 71
- Gene Kelly - 70

If you don't have time to accept my challenge to a foot race, I hope you will take the time to change the present totally irrational law!

Thank You,

Richard G. Wiggin

Richard G. Wiggin, Ph.D.
3637 No. Harrison St.,
Arlington, Va. 22207
Tel: 536-6322

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

September 17, 1982

Honorable Don Nickles
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, D. C. 20510

Dear Senator Nickles:

Enclosed are my answers to questions enclosed with your letter of September 3, 1982 concerning the Age Discrimination in Employment Act which arose out of the Subcommittee's hearing on August 18, 1982.

I hope that this report is satisfactory to you. If you have any further questions, I will be pleased to answer them.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

Enclosure

Answers to Questions in Chairman Nickles' Letter of September 3, 1982

1. Does the EEOC handle ADEA complaints differently than Title VII complaints? If so, how? Why?

In 1979, when enforcement of the ADEA was transferred from the Department of Labor to the Commission, the Commission decided it would not try to design new procedures for handling such charges/complaints until it had had more experience with the program. Under the Department of Labor procedures, which the Commission adopted, ADEA charges/complaints were processed with an initial attempt (usually over the telephone) to conciliate or settle the case. If this attempt was unsuccessful, the case was usually closed, with a very small number going on for in-depth investigation. Within the last year, changes have been made in ADEA complaint/charge processing to conform as much as possible to Title VII processing. The most important such change is the increased use of fact-finding conferences in ADEA processing.

To the extent that ADEA charges/complaints are handled differently from Title VII charges it is because the ADEA requires certain procedures be used with ADEA charges/complaints which Title VII does not require for Title VII charges and vice versa. The ADEA states, at §7(d), that "...the [Commission] ... shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Therefore, the first action taken by the Commission is to attempt to settle the charge/complaint. Following this attempt at settlement, there is no statutory requirement that the charge/complaint be investigated and a determination made as to its merits. On the other hand, Title VII requires that all charges be processed to some kind of resolution (usually a settlement or a determination on the merits of the charge).

2. According to production comparison reports for fiscal years 1980-81, the rate of settlements for ADEA cases is half as much as that for Title VII cases. What are the reasons for this difference?

It is true that the settlement rate is higher in Title VII processing than in ADEA processing: in FY 81, 43 percent of new Title VII charges processed in rapid-charge processing units were settled, while 22 percent of ADEA charges/complaints were settled. The principal reason for this difference is that the workload under ADEA, in comparison to the resources allotted by the Congress to its enforcement, has been overwhelming from the beginning. Current guidance to the field calls for approximately 20 percent of the ADEA workload to be designated for an initial settlement attempt only under §7(d) of the Act, and closure without further investigation if that attempt is not successful. With less information consequently being developed in these ADEA case files, settlement is far less likely to occur than in a Title VII case, where investigation is the first step and settlement attempts are made only after some gathering of evidence.

There was an error in the report referred to you regarding settlement of cases in litigation. The report transposed the FY 80 settlement figures for the ADEA and the Equal Pay Act. The reported figure of 42 ADEA settlements in FY 80 should in fact have been 9 ADEA settlements. Thus, instead of declining by 48 percent between FY 80 and FY 81, the numbers of ADEA settlements actually increased by 144 percent.

3. ADEA allows for plaintiff to request a jury trial when a case is litigated whereas Title VII has no such provision. Have EEOC attorneys experienced any difficulties or any differences in handling Title VII cases from ADEA? What has been the general experience of the EEOC in litigating ADEA cases before a jury?

EEOC has, thus far, had very limited experience in trying ADEA cases before juries. Indeed, the first three jury trials occurred in the current fiscal year.

4. Section 4(f)(2) of ADEA, pursuant to an interpretative bulletin of the U.S. Department of Labor, allows employers to stop accruing benefits in pension/welfare funds for employees over age 65. This exemption is allowed under the 1978 ADEA Amendments. What review, if any, is the EEOC undergoing to examine or revise this policy? If the age 70 cap were lifted under ADEA, would the EEOC be bound by the legislative history of the 1978 Amendments?

Since the passage of the ADEA in 1967, Section 4(f)(2) has permitted employers to make age-based differentiations in employment benefits where the distinction is based on the increased cost of providing certain benefits to older workers. In 1978, Section 4(f)(2) of the ADEA was amended to make clear that the exception did not permit involuntary retirement, even pursuant to a bona fide employee benefit plan. The 1978 amendments also amended Section 12 of the ADEA to increase the maximum age level of those covered by the Act from 65 to 70 years of age.

During the passage of the 1978 amendments, the Department of Labor (DOL), then administering agency for the ADEA, was instructed to issue more comprehensive guidelines with respect to Section 4(f)(2). In response, the DOL issued an amendment to its Interpretative Bulletin on Employee Benefits (IB) (now codified at 29 C.F.R. Part 860.120). In promulgating the new special rules applicable only to pension and retirement plans, the DOL relied heavily on the legislative history containing a letter from its then own Assistant Secretary for Employment Standards, Donald Elisburg, to Senators Williams and Javits. See S. Rept. No. 95-493, 95th Cong., 1st Sess. 14-16 (1977); 123 Cong. Rec. H. 9977, daily ed. September 23, 1977.

Briefly summarized, those rules interpret the ADEA to permit pension plans (1) to cease employer contributions at normal retirement age, (2) to not credit years of service, salary increases and benefit improvements which occur after an employee reaches the normal retirement age specified in the plan, and (3) not adjust actuarially the benefit accrued as of normal retirement age for an employee who continues work beyond that age.

Upon assuming jurisdiction over the ADEA in 1979, the Commission reviewed all existing DOL interpretations, including the IB on employee benefits. Upon review, the Commission focused on the issue of the apparent discrepancy between the 1967 legislative history of Section 4(f)(2) and the history contained in the 1978 amendments. Thus, the Commission considered issuing a notice of proposed rule change concerning those provisions of the IB concerning post-normal retirement age cessation of benefits. At this time, however, the Commission has taken no action and the IB is still in effect. (The IB has been the subject of two civil actions, one brought by an employer group and another brought by an employee group. The Commission has taken the position in both cases that the IB is still under review.)

The questions that have arisen both in Commission review and in litigation concerning the IB suggest that the issue of post-normal retirement age cessation of benefits is an issue that must be specifically addressed by Congress in making any amendment to the applicable sections of the ADEA. If Section 12 of the ADEA is amended to lift the age 70 cap, and the accompanying legislative history is silent on the question of employer contributions to pension plans after normal retirement age, it would be left to the courts to determine whether employee benefits for newly covered workers would be covered by the general rule of Section 4(f)(2), i.e., whether any reduction of benefits can lawfully occur unless justified by an increased cost of providing the benefit.

5. What difficulties, if any, has the EEOC experienced in handling its workload, particularly with ADEA cases since the 1979 Reorganization Plan?

The principal difficulty has been too large a workload, coupled with insufficient resources to handle it. The receipt of ADEA charges/complaints filed has been as follows: FY 79 - 5,374; FY 80 - 11,076; FY 81 - 9,479; and the first half of FY 82 annualized linearly - 11,800. This increase has occurred during a time of decreasing resources. Thus, a difficult program situation has been created by a doubling of workload in three years, with a continuing upward spiral, and insufficient resources to handle the dramatically increasing workload.

6. In early August, the EEOC issued guidelines for issuing advisory opinions under ADEA interpretations. The EEOC has not used this approach with Title VII cases. Why not? Are there peculiar situations which make the present ADEA language difficult to administer or difficult for employers to follow?

In response to the question concerning Title VII, the Commission has published guidelines for issuing opinions and interpretations of Title VII. These guidelines are found at 29 C.F.R. §1601.31-33, and provide the public with the procedures to follow in requesting such advice. The Commission has issued proposed guidelines under the ADEA that mirror in part the Title VII procedures for the issuance of opinions and interpretations. The ADEA guidelines will soon be published in final form. The issuance of opinions and interpretations under both acts, if done in accordance with the applicable regulations, may immunize an employer from liability if he pleads and proves that he relied upon the opinion or interpretation in question. Compare Section 713(b) of Title VII, 42 U.S.C. §2000e-12(b) and Section 7(e)(1) of the ADEA, 29 U.S.C. §626(e)(1).

Because of the potential legal effect of issuing opinions and interpretations, the Commission issues them sparingly. As the regulations under both statutes provide, however, in situations where formal opinions are not issued, the Commission will provide informal advice and assistance. The need for such advice under the ADEA does not stem from any particular difficulty in present ADEA language, but rather arises from the individual nature of each claim. Because liability under both statutes may turn on complicated factual determinations, there is an ongoing need for the issuance of informal advice to individuals and employers.

7. The number of ADEA cases filed between 1980 and 1981 increased 89 percent. The figure is in sharp contrast to the 15 percent increase in Title VII cases. Other than that more people are filing complaints, why has there been such a heavy increase with ADEA cases filed?

The sharp increase in ADEA case filing between FY 80 and FY 81 was intentional, i.e., EEOC attorneys made a concerted effort to increase case filings.

The University of Tennessee

PRIMARY CAMPUSES:
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Office of the President

Suite 800, Andy Holt Tower
Knoxville 37996-0180
Telephone 615 / 974-2241

August 18, 1982

The Honorable Howard H. Baker, Jr.
United States Senate
4123 Dirksen Office Building
Washington, D.C. 20510

Dear Howard:

I understand that legislation to amend the Age Discrimination in Employment Act of 1967 by eliminating the mandatory retirement age (H.R. 6576 by Congressman Pepper; S. 2617 by Senator Heinz) may be considered by Congress during its current session. May I state my strong and unequivocal belief that enactment of such legislation would be a disaster for higher education in this country.

As you know, most colleges and universities in this country protect the academic freedom of their faculties through a tenure system which provides that, after a specified period of probationary service, a faculty member may be dismissed only for serious cause following a hearing by a properly constituted peer group. Once an individual has been granted tenure, the burden of proof of his or her fitness to serve is shifted from the individual to the institution.

It would be essentially impossible under the present system to dismiss a tenured faculty member who is simply "slowing down" because of advanced age. The University would have to prove conclusively that he or she is no longer able to carry out assigned duties effectively.

Enactment of these amendments would, therefore, force colleges and universities either to modify significantly their tenure systems or to retain large numbers of faculty well beyond current retirement age, thereby slowing the infusion of young, vigorous faculty with new ideas.

This latter problem is made much more serious by the projected decline of higher education enrollments over the next decade, making it difficult to justify the employment of new faculty except as positions become open through retirement or death of current faculty members. Even under present laws, retirement rates are low. Faculty age distribution at most universities is heavily weighted toward the 40- and 50-year age range because of rapid expansion of faculties in the 1960's, in response to rapid increases in university enrollments.

UT *Tennessee's State University and Federal Land-Grant Institution. . . .established 1794*

Finally, I should point out that such massive restrictions on hiring of new faculty as a result of proposed legislation would bring to a near standstill efforts of colleges and universities to increase representation of women and minority groups on their faculties. Affirmative Action in hiring can only occur if there are positions to be filled.

May I urge you to oppose vigorously any efforts to prohibit universities from imposing a mandatory retirement age. If I can provide you with additional information or assistance on this matter, please let me know.

Sincerely yours,

Edward J. Boling
President

EJB:nh

cc: Vice President Joseph E. Johnson
Vice President John W. Prados
Vice President Emerson H. Fly
Mr. Jerry Roschwalb
Dr. C. Douglas Norman

TESTIMONY BY

THE MAYOR'S COMMISSION ON SERVICES TO THE AGING

PHILADELPHIA, PENNSYLVANIA

SUBMITTED TO THE SENATE LABOR SUBCOMMITTEE HEARING ON THE AGE DISCRIMINATION AND EMPLOYMENT ACT

AUGUST 18, 1982

ON MAY 7, 1982, THE HONORABLE WILLIAM J. GREEN, MAYOR OF THE CITY OF PHILADELPHIA, RECOMMENDED TO THE CITY'S CIVIL SERVICE COMMISSION THE ABOLITION OF THE MANDATORY RETIREMENT AGE FOR CITY WORKERS. THE MAYOR STATED AT THAT TIME THAT "MANDATORY RETIREMENT IS NOT ONLY DISCRIMINATORY BUT IT ALSO ROBS INDIVIDUALS OF THE OPPORTUNITY TO CONTINUE USEFUL CAREERS WITH THE CITY GOVERNMENT. BESIDES ROBBING THE CITY OF EXPERIENCED WORKERS," THE MAYOR CONTINUED, "MANDATORY RETIREMENT IS COSTLY IN BOTH CITY PENSIONS AND FUNDING TO TRAIN NEW EMPLOYEES TO FILL POSITIONS VACATED BY THE FORCED RETIREES."

THE MAYOR ABOLISHED COMPULSORY RETIREMENT AND THE BAN ON APPOINTMENTS FOR PEOPLE 70 AND OLDER AT THE REQUEST OF THE MAYOR'S COMMISSION ON SERVICES TO THE AGING. THE COMMISSION AND THE CITY'S PERSONNEL DEPARTMENT HAVE THOROUGHLY INVESTIGATED THE EFFECTS OF THESE CITY ORDINANCES. WE WOULD LIKE TO SHARE OUR FINDINGS WITH THIS COMMITTEE.

CURRENTLY, CITY EMPLOYEES ARE REQUIRED TO RETIRE AT AGE 70 UNLESS THEY ARE APPROVED FOR EXTENSION. AT THE PRESENT TIME WE HAVE 14 EMPLOYEES WHO ARE OVER 70 YEARS OF AGE FOR WHOM

EXTENSIONS HAVE BEEN GRANTED. THE FOLLOWING TABLE SHOWS THE YEARS IN WHICH ADDITIONAL EMPLOYEES WILL ATTAIN AGE 70:

YEAR	NUMBER OF EMPLOYEES
1982	17
1983	29
1984	37
1985	48
1986	62
1987	25

THE FACTS ARE THAT OF THE APPROXIMATELY 27,000 CITY EMPLOYEES, ONLY 278 INDIVIDUALS OR 1% OF THE WORK FORCE WILL REACH THE AGE OF 70 WITHIN THE NEXT 6 YEARS. THE DATA CLEARLY INDICATES THAT MOST MUNICIPAL EMPLOYEES VOLUNTARILY RETIRE WELL BEFORE THEY REACH THE MANDATORY RETIREMENT AGE. THESE FIGURES QUITE APPARENTLY DO NOT REPRESENT AN AGING WORK FORCE.

THIS VOLUNTARY RETIREMENT PATTERN IS ALSO EVIDENT IN THE EMPLOYMENT DEMOGRAPHICS OF THE COMMONWEALTH OF PENNSYLVANIA. THE COMMONWEALTH HAS NEVER HAD AN AGE CAP FOR EMPLOYMENT OR RETIREMENT. DESPITE THE ABSENCE OF A COMPULSORY RETIREMENT PROVISION, STATE GOVERNMENT IS NOT SWOLLEN WITH OLDER WORKERS. ON THE CONTRARY, THE STATE PERSONNEL IS EVEN LESS "GRAY" THAN THE CITY OF PHILADELPHIA WHICH HAS ONLY NOW ELIMINATED MANDATORY RETIREMENT AND AGE APPOINTMENT REQUIREMENTS. PRESENTLY THERE ARE 99,686 FULL TIME COMMONWEALTH OF PENNSYLVANIA EMPLOYEES. THE FOLLOWING TABLE SHOWS THE NUMBERS OF STATE WORKERS 70 OR OLDER AS OF JULY 15, 1981:

AGE	NUMBER OF EMPLOYEES
70	98
71	69
72	48
73	53
74	41
75 AND OLDER	97

THE TOTAL NUMBER OF STATE EMPLOYEES 70 OR OLDER IS 406, OR 4/10 OF ONE PERCENT OF THE COMMONWEALTH OF PENNSYLVANIA'S WORK FORCE. ONCE AGAIN THE FACTS CLEARLY SHOW THAT AN INSIGNIFICANT NUMBER OF OLDER PEOPLE CHOOSE TO REMAIN EMPLOYED PAST AGE 70. THE EXPERIENCE OF PENNSYLVANIA IS PARTICULARLY RELEVANT TO THE HEARINGS TODAY SINCE THE STATE HAS NEVER FORCED ITS WORKERS TO TERMINATE THEIR SERVICES BECAUSE OF AGE. SIMPLY PUT, PENNSYLVANIANS VOLUNTARILY RETIRE FROM STATE GOVERNMENT AS A MATTER OF NATURAL COURSE AS THEY ADVANCE IN YEARS. IT THEREFORE SEEMS UNLIKELY THAT REMOVING THE AGE CAP IN THE PRESENT ADEA LEGISLATION WILL HAVE MUCH IMPACT ON THE NUMBERS OF OLDER AMERICANS IN OUR NATION'S WORK FORCE.

S. 2617 PROPOSES THAT THOSE PEOPLE, 70 AND OVER, WHO WANT TO WORK AND WHO CONTINUE TO BE PRODUCTIVE, SHOULD STILL BE ABLE TO DO SO. CAN WE AS A NATION FAIL TO PROVIDE PROTECTION FROM DISCRIMINATION FOR THIS SMALL NUMBER OF SENIOR ADULTS WHO CHOOSE TO REMAIN IN THE WORK FORCE? WE URGE THE COMMITTEE TO REPORT FAVORABLY ON THIS SIMPLE AND STRAIGHT-FORWARD BILL.

THANK YOU VERY MUCH.

August 16, 1982

A JOINT STATEMENT BY THE PRESIDENTS OF THE ASSOCIATION OF AMERICAN COLLEGES, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AND AMERICAN COUNCIL ON EDUCATION

Because Congress may soon consider legislation prohibiting mandatory retirement in employment, we join in expressing the united position of our three organizations -- Association of American Colleges, American Association of University Professors, and American Council on Education -- in opposition to this proposal. We believe there are compelling reasons why Congress should not pass this legislation now. We speak from the vantage point of a sector of the economy -- colleges and universities -- in which mandatory retirement policies have existed since the early years of this century. They have contributed significantly to the strength and vitality of our institutions. We believe that American higher education would suffer significant harm if Congress were to approve the proposed legislation eliminating mandatory retirement.

The Age Discrimination in Employment Act of 1967, as amended in 1978, prohibits mandatory retirement from employment because of age for those persons employed in the private and non-federal public sectors between the ages of 40 and 70. The one exemption in the law permits the mandatory retirement at age 65 of certain business executives. A similar exemption for tenured faculty members at colleges and universities expired on July 1, 1982. The proposed legislation would eliminate the mandatory retirement age of 70 for all employees in the private and public sectors, except the exempt business executives, effective January 1, 1983.

Several significant factors should be taken into account when Congress considers the proposed legislation. They transcend the interests of higher education but will inevitably affect higher education as a part of the total economy. A primary factor is the depressed state of the economy, particularly the current high rate of unemployment. Legislation expanding the size of the labor force during a period of persistently high rates of unemployment among younger workers seems especially untimely. A second factor is the obvious need for a carefully-planned quantitative and qualitative assessment of the impact of eliminating mandatory retirement on the new generations of educated workers -- recent high school and college graduates, young people with advanced specialized training, women, and minorities -- and on particular industries and sectors of the economy. A third factor involves the need for consideration of concurrent changes in those federal laws and policies, including the Social Security Act and the Employee Retirement Income Security Act, that are affected directly by the proposed legislation.

The academic community has two major concerns about the proposed legislation. First, in the absence of mandatory retirement, the number of academic positions and opportunities for advancement of able young persons would be markedly reduced. As a result of the expansion of colleges and universities in the late 1950s and 1960s, there exists a "bulge" of faculty members who will not retire --even under the current law -- before the latter years of this century. In 1978 almost 60% of all faculty members were under 45 years of age and 73% were under 50. This factor, when coupled with the reductions in enrollments now beginning as the size of the traditional college-age population declines substantially, has already resulted in a situation where most openings in full-time academic positions develop as a result of attrition.

Although other sectors of the economy are experiencing a similar period of limited or no growth, no other sector must adjust to such an extreme demographic model. Most projections of enrollments anticipate an overall decline of approximately 15 percent in full-time equivalent students between 1981 and 1995. Assuming an age 70 for normal retirement, projections suggest that there may be only about 100,000 academic positions to be filled nationally during the entire period of 1980-1995. This equals the total demand for faculty in 1965-1967, the three peak years of recent history, and compares unfavorably with the 60,000 positions that were filled in the five years from 1971 to 1975.

The decline in the number of academic positions over the fifteen year period of 1980-1995 is a matter of considerable concern to the academic community. We do not know what the precise impact will be, but on the basis of reasonable projections we assume that talented young people will be dissuaded from pursuing advanced academic training and careers. We believe this loss will have a negative impact on the quality of teaching and research. It will also leave us seriously short of experienced faculty members to replace the large numbers of faculty expected to retire in the latter years of the 1990s. It is our fear of the long-term consequences of a lost generation of scholars that unites us in our concern about the proposed legislation.

Second, the proposed legislation poses a serious threat to academic tenure, which is important to advancing scholarship and protecting academic freedom. For almost half a century, the relationship between tenure and a mandatory retirement age has been the subject of guidelines to the academic community in statements adopted jointly by the Association of American Colleges and the American Association of University Professors. The basic premise is that tenure is not a commitment for the duration of the incumbent's working life, but only until a reasonably late retirement age. The 1940 Statement of Principles on Academic Freedom and Tenure recognizes tenure not as a lifetime commitment but as one which terminates upon reaching the age of retirement. The 1950 Statement on Academic Retirement and Related Subjects recommended that institutions have "a fixed and relatively late retirement age, the same for teachers and administrators." The same recommendation was retained in subsequent revisions of the 1950 Statement in 1958, 1969, and 1980. The purpose of a retirement policy that includes provision for mandatory retirement, according to the 1950 Statement, is to attract individuals of the highest scholarly abilities to the academic profession, to enhance faculty morale, to permit faculty to focus solely on their service to the institution, and to protect the institution against the continued employment of faculty beyond years of effective service.

Under the proposed legislation, colleges and universities would be faced with a choice between two very undesirable options: (1) they could elect to keep the tenure system as it now functions essentially intact, with the result that individuals would have the assurance of continued employment for life; or (2) they could seek to eliminate or alter tenure in some substantial way with chilling effects on academic freedom and, consequently, on teaching, research, faculty morale, and the long-term advancement of knowledge. The experience of the academic community demonstrates that a mandatory retirement policy has the advantage of allowing institutions to achieve the positive purposes which tenure provides. To eliminate mandatory retirement would pose a serious threat not only to academic tenure but also to existing contractual relations otherwise thought to be fair within the academic community and to an institution's ability to plan for the future.

Finally, the academic community is beginning now the first academic year since the expiration of the exemption for tenured faculty imposed by the Age Discrimination in Employment Act Amendments of 1978. Obviously, there has not been sufficient time to ascertain the impact of the transition from age 65 to age 70. We do not know, for example, if there will be a sudden massive shift to age 70 as the normal retirement age although within recent years, largely as a result of the erosion of academic salaries, the normal retirement age has moved upwards from age 65.

In view of the problems that would confront the academic community if legislation prohibiting age-related mandatory retirement were enacted, we recommend that the legislation include a provision permitting mandatory retirement at age 70 for academic administrators and faculty members who hold tenure in institutions of higher education.

Mark H. Curtis, President
Association of American Colleges

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AUG 30 1982

Whirlpool
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Administrative Center

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CHARLES D. PUTNAM
VICE PRESIDENT
PERSONNEL

August 27, 1982

The Honorable Orrin G. Hatch
Chairman, Committee on Labor
and Human Resources
United States Senate
4230 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Chairman Hatch:

The Labor Subcommittee of the Senate Committee on Labor and Human Resources is now deliberating amendments to the Age Discrimination in Employment Act (ADEA). One of these is bill S. 2617.

Enclosed please find Whirlpool Corporation's statement which recommends three changes to ADEA.

Sincerely,

Charles D. Putnam

CDP/kp
Enc.

cc: Senator Don Nickles
Senate Labor Committee

WHIRLPOOL CORPORATION
COMMENTS ON AMENDMENTS TO THE
AGE DISCRIMINATION IN EMPLOYMENT ACT -- S. 2617

Whirlpool Corporation is a leading manufacturer and marketer of major home appliances. We have manufacturing plants in seven (7) midwestern and southern states, and marketing and consumer affairs operations in another 27 states throughout the nation. The company has approximately 19,300 employees nationwide. We are, therefore, vitally interested in legislation that affects the company's employment policies.

Whirlpool has no disagreement with proposed legislation (S. 2617) to remove the mandatory retirement age cap in the Age Discrimination in Employment Act ("the Act"). However, we believe that other, equally important issues not covered in S. 2617 should also be changed in the Act to provide greater uniformity, fairness and consistency in carrying out the intent of the Act. Following are our proposed changes to the Act:

1. Sharing of Findings

The findings in age discrimination investigations carried out by the Equal Employment Opportunity Commission are not shared with the employer. Defendants are merely notified in meritless cases that the investigation will not be continued. EEOC's close-mouthed practice, however, is used only in cases under the jurisdiction of the Act. In Title VII non-age discrimination charges, for example, EEOC will inform the employer that there is no probable cause for a finding of discrimination. Under ADEA, however, the employer is put in a position of having to supply voluminous data to the EEOC only to be informed that the EEOC will not continue the investigation.

Without details of the agency's findings, employers have no opportunity to review the accusations or to use the agency's determination to build their defense prior to any court proceedings. The plaintiff has a clear -- and blatantly unfair -- advantage over the defendant who must respond to the charges. This practice is also totally inconsistent with a tradition of fair play common in other areas of American jurisprudence.

We urge members of the Senate Labor and Human Resources Committee to remove this unfairness by amending the Act to require EEOC to share their total findings with the defendant, and in a timely manner.

2. Elimination of Jury Trials

The Act allows the plaintiff a choice between a bench or a jury trial to pursue their case against the employer. However, in the field of discrimination law, only the Age Discrimination in

Employment Act (ADEA) provides for jury trials. No right to a jury trial is provided by Title VII in connection with any other type of discrimination litigation. There is no logical reason for providing any greater rights in connection with age discrimination than with any other type of discrimination.

In recent years, we have witnessed a growing propensity by plaintiffs to choose jury over bench trials. This is largely explained by the fact that jury verdicts have vastly favored the plaintiff against the employer. Juries seem more easily influenced by emotional appeals; whereas judges' decisions are based more on the facts of the case.

To assure that only the facts of the case prevail, the Act should be amended so that age discrimination cases cannot be tried before a jury.

3. Elimination of Liquidated Damages

The Act allows for payment of double damages if there is a determination that the defendant's action was a willful violation of the Act. The provision for double damages is unique to the Act. Title VII, for example, does not contain a similar provision.

The prospect of receiving double damages can be a strong incentive to promote age discrimination charges. Pressure to pursue legal remedy could be further aggravated by a plaintiff's counsel -- who has a strong interest in pressing for court action where double damages are at stake, regardless of the merit of the allegation. Unwarranted court proceedings are costly for the defendant. They also increase the workload of a judicial system already bogged down by an unprecedented number of cases awaiting legal action.

Congress can discourage unwarranted age discrimination charges, and simultaneously take pressure off the court system, by removing the carrot of double damages from the Act.

We urge members of the Senate Committee on Labor and Human Resources to incorporate the three changes above into the Age Discrimination in Employment Act. Each of these will provide for greater uniformity, fairness and consistency in applying age discrimination law -- without jeopardizing or restricting fair treatment for legitimate charges of discrimination.

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JOHN F. COLLINS

SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR & HUMAN RESOURCES
UNITED STATES SENATE

STATEMENT OF CONCERN

Mr. Chairman and Members of the Subcommittee:

This firm represents numerous clients in matters concerning age discrimination. Because of our interest in various aspects of the ADEA, a representative of our firm attended the Senate hearing on proposed changes to the ADEA held on August 18, 1982. Since the record is being held open for thirty days, we would like first to express our views relative to certain important issues concerning procedural ambiguities of the ADEA, and second, to clarify some misstatements made at the hearing.

Procedural Ambiguities

The ADEA requires that a litigant file a charge with the Secretary of Labor within 180 days after the alleged unlawful practice occurred, or in a "deferral state" within 300 days. 29

U.S.C., Section 626(d)(1) and (2). Until December, 1980, the majority of ADEA cases had held that the 180 or 300-day period began to run on the last day the employee performed services for the employer. This rule is known as "the last day of employment rule." Two recent United States Supreme Court cases, *Delaware State College v. Ricks*,[1] 449 U.S. 250 (1980) and *Chardon v. Fernandez, et al.*,[2] U.S. 70 L.Ed.2d 6 (1981)(per curiam), have rejected the last day of employment rule in favor of "the day of notice" rule. The Rick's day of notice rule requires a two-part test:

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[1] In the *Ricks* case, a black professor was denied tenure on March 13, 1974, but was not immediately discharged. He was given a one-year terminal contract which expired on June 30, 1975. The professor filed a charge of racial discrimination April 28, 1975. The Court held that the filing of the charge was not timely because the discriminatory act was the denial of tenure in 1974 and that the time to file began to run then.

[2] In *Chardon*, 23 plaintiffs were administrators in the Puerto Rico Department of Education and were notified by letter of the termination of their employment in advance of their termination. The letters came to each plaintiff at various times prior to June 18, 1977. Discharge dates were between June 30, 1977 and August 8, 1977. On June 19, 1978, the plaintiffs filed suit. The District Court held that the action was barred by the applicable one-year statute of limitations. The First Circuit held that the discriminatory action occurred when the plaintiffs actually terminated, not on the earlier date when they received notification of their termination. The United States Supreme Court rejected the First Circuit's argument, citing the *Ricks*' case as follows:

> The operative decision was made -- and notice given -- in advance of a designated date on which employment terminated.
>
> In *Ricks*, we held that the proper focus is on the time of the *discriminatory act*, not the point at which the consequences of the act become painful....

1. Determination of the discriminatory act by examining the essential element of the complaint; and
2. Determination of the time when the decision to terminate was made and notice of a designated date was communicated to the employee.

Although the Ricks and Chardon cases are not age discrimination cases, some district courts have been applying the Ricks analysis to ADEA cases. The Ricks and Chardon cases have created certain technical and practical problems for litigants in the age discrimination area, which problems should be addressed by your committee.

First, the result of this application is the abandonment by the courts of an objective standard that unmistakenly establishes for litigants and the courts the exact date on which the alleged unlawful practice occurred. Instead, the Ricks rule creates uncertainty relative to when the time to file a complaint with the Secretary of Labor begins to run. In many instances, factual questions are created concerning notice. For example, notice may be ambiguously phrased, may be oral, or may be transmitted by a person whose authority is subject to question. Questions with regard to the adequacy of notice promote needless litigation over technical niceties, uncertainty and confusion.

Second, in some instances, an employee is placed in an uncompromising position of having to file a complaint when he or she is still employed, and a possible discriminatory act is still revocable and incomplete. For example, under the Ricks analysis, if an employer notifies an employee that he or she must leave in 7 months, and the employee suspects that the termination is based on discriminatory motives, that employee must file a charge of discrimination within 180 days of the day of notice, during a time when he or she is still employed, and may be negotiating to remain on the job. Clearly, a complaint filed with the Secretary of Labor against the employer would not enhance an employee's negotiating posture.[3]

Third, it would be advantageous for an employer, who is well versed in the timing requirements of the ADEA and who has a desire to circumvent that act, to deliberately notify an employee more than six months prior to a termination date. Under these circumstances, an employee, unrepresented by counsel and not aware of the timing requirement of the ADEA, would not be likely to file a complaint against the employer while still employed. By the time the last day of employment occurred, the time to file a complaint would have already expired. In effect, the application of the Ricks analysis to ADEA cases creates needless technical issues and permits employers to manipulate a notice of termination so that there is more than a 180 day hiatus between the date of notice and the date of termination.

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[3] While this problem continues to exist in the demotion cases, it would be ameliorated if the time to file a charge begins to run when the demotion becomes effective, not when notice of the demotion is given. In this way, a charge would not have to be filed during negotiations between the employer and employee.

There are other procedural hazards in the ADEA for laymen, and even for the skilled lawyer. The requirements for litigants in "deferral states" differ from those for litigants in "non-deferral" states. Deferral state litigants have 300 days in which to file a charge of discrimination with the Secretary of Labor instead of 180 days, giving them 120 more days than a litigant in a "non-deferral" state. Moreover, after the Supreme Court's decision in Mohasco Corp. v. Silver, 447 U.S. 807 (1980), "deferral state" litigants may not have 300 days, but only 240 days. Id. at 827.

A wronged party should be able to easily initiate the process of complaining about age discrimination. At the very least it is our suggestion that 1) the filing requirements should be changed so that all litigants have 300 days in which to file a charge of discrimination with the Secretary of Labor and 2) the time to file a charge should begin to run from the last day of employment. Given all of these circumstances, it is our recommendation that Congress amend Sec. 626d(1) of the ADEA to specify that:

> the time a charge shall be filed is within 300 days from the date the employee leaves a job because of the alleged unlawful practice. In the event of a demotion because of an alleged unlawful practice, the time a charge shall be filed is within 300 days from the date the demotion is effective.

While there are other areas of the ADEA that require change and simplification, we will not address those issues here, but we would be happy to assist the Subcommittee in initiating changes to the ADEA not enacted in this session.

Statements By Witnesses At The Hearing

Certain statements made by witnesses of the Business Community Panel were not entirely accurate. The business community would have this committee believe that employers have a very heavy burden of proof in age discrimination cases. Quite to the contrary, the plaintiff (employee) has the burden of proof in an age discrimination suit. All the employer must do to refute the presumption created by the plaintiff's prima facie case is to introduce a legitimate reason other than age for the discharge. The plaintiff, in turn must prove that the legitimate reasons proferred were not the employer's true reasons, but merely a pretext for age discrimination. The plaintiff must ultimately prove that the discharge was on account of age.

In addition, the witnesses of the business community have exaggerated the potential effect of the liquidated damage provision in the ADEA. They erroneously maintain that the liquidated damage provision is a key factor in encouraging litigation since the possibility of a huge money award makes taking a case to trial much more attractive than settling. Congress intended the liquidated damage provision to be a substitute for other damages such as pain and suffering which are normally awarded in tort cases. Accordingly, the existence of a liquidated damage provision is no more of an incentive to go to trial than the possibility of damages for pain and suffering.

We would be happy to respond to any questions the subcommittee might have. Thank you for your consideration of this matter.

Very truly yours,

BROWN, RUDNICK, FREED & GESMER
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Statement By

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

To

THE SUBCOMMITTEE ON LABOR

Of

THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

During

HEARINGS TO AMEND THE AGE DISCRIMINATION IN EMPLOYMENT ACT

AGC is:

- More than 30,000 firms including 8,500 of America's leading general contracting firms responsible for employment of over 3,500,000 employees;
- 113 chapters nationwide;
- More than 80% of all contract construction of commercial buildings, highways, industrial and municipal utilities facilities.

The Associated General Contractors of America (AGC) opposes S.2617. The bill, which is designed to abolish mandatory retirement, could spark a broad attack on the basic assumptions of thousands of pension and other employee benefit plans. Moreover, the fundamental argument in support of the bill -- that it will forestall future labor shortages -- denies any relationship between labor supply and demand. Finally, the bill would foreclose serious consideration of all of the available employer options to provide employment opportunities for older employees.

For over sixty years, AGC has served as the principal forum for the discussion of the political and economic issues which impinge on construction. AGC represents 8,500 of the nation's leading general contractors. AGC's members account for 80% of all contract construction of buildings, highways, industrial facilities, and municipal utilities. For sound business reasons, AGC's members base their employment decisions on ability to perform.

Although mandatory retirement lies at the heart of the current debate, the Age Discrimination in Employment Act (ADEA) prohibits much more than the mandatory retirement of older employees -- those between 40 and 70. The statute prohibits age discrimination in hiring, discharge, compensation, or indeed any term, condition or privilege of employment. The statute also prohibits any classification "which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age ...." The logical and legal result is that S.2617, which would simply remove the age

70 cap on the ADEA, would more than abolish mandatory retirement. The bill would extend a broad range of restrictions.

AGC submits that Congress has a commensurate obligation to the American people to study and explain S.2617. How do employers use the flexibility now available to them? Does this flexibility ever work to the advantage of older individuals? What are the merits of the alternative of just removing the cap with respect to retirement? Congress should not confine the debate to mandatory retirement, and then proceed to disregard the range of other restrictions which the bill would extend.

AGC is concerned that passage of S.2617 will ultimately require thousands of construction contractors to restructure their pension and other employee benefit plans. The 95th Congress outlined, and the Labor Department later refined, the basic assumptions of these plans. S.2617 will challenge prior actions and assumptions. To illustrate our concern, AGC offers the following comment.

In section 4(f)(2), the ADEA carves out an exception to its otherwise broad ban on age discrimination. The section permits employers "to observe the terms of ... any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of the Act ...." Employers can lawfully adjust the pension and other fringe benefits of their older workers so long as the adjustments fall within the four corners of section 4(f)(2).

The problem is that the section requires interpretation. When is a plan "bona fide?" What does it mean to "observe the terms" of a plan? When is a plan a "subterfuge to evade the purposes" of the

ADEA? A closely related problem is that the Employee Retirement Income Security Act (ERISA) comprehensively regulates pension and other employee benefit plans. How does section 4(f)(2), and indeed the entire ADEA, inter-relate with ERISA?

These questions clearly troubled the 95th Congress, the last Congress to amend the ADEA. Among other things, the 95th Congress raised the age limit from 65 to 70, and overturned United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), in which the Supreme Court had held that section 4(f)(2) authorized mandatory retirement. To clarify the effect of raising the cap, the Chairman of the Senate Labor and Human Resources Committee consulted the Department of Labor (DOL). In fact, the Committee later included DOL's response in its report. See S. Rep. No. 95-493, 95th Cong., 1 Sess. 14-16 (1977). The thrust of DOL's response was subsequently promulgated through the regulatory process and is discussed in detail later in these comments. The House Committee on Education and Labor approached the amendments to the ADEA with equal caution. See H. Rep. No. 95-527, 95th Cong., 1st Sess. 9 (1977).

Even then, legislators remained concerned that raising the cap would have unforeseen effects on pension and other employee benefit plans. For the record, Senator Jacob Javits (R-NY) and Senator Harrison Williams (D-NJ) further discussed specific intent. See 124 Cong. Rec. S.4450-51 (daily ed. March 23, 1978). Representatives John Dent (D-PA) and Augustus Hawkins (D-CA) had an almost identical discussion. See 124 Cong. Rec. H.2271 (daily ed. March 21, 1978). Representatives

Claude Pepper (D-FL), Theodore Weiss (D-NY) and Henry Waxman (D-CA) also addressed the several questions surrounding section 4(f)(2). See 124 Cong. Rec. H.2275-77 (daily ed. March 21, 1978).

In May of 1978, the Labor Department interpreted the legislative history, through the regulatory process, into final guidelines on section 4(f)(2). See 29 C.F.R. §860.120. Among other things, the guidelines strike a balance between ERISA and the ADEA. At the outset, the guidelines provide:

- that a plan is "bona fide" if the employer has notified all of its employees, in writing, of the terms of the plan, and the plan actually provides benefits in accordance with these terms;
- that an employer "observes the terms" of a plan when it implements the express and clearly mandatory language of a plan;
- that a welfare plan is not a "subterfuge" if increasing costs justify any decrease in benefits for older employees, and
- that employers may compare the costs of welfare benefits on either a "benefit-by-benefit" basis, or a "benefit package" basis.

With regard to retirement plans, the guidelines further provide:

- that a defined benefit plan may exclude anyone hired within 5 years of normal retirement age;
- that a defined benefit plan may also exclude anyone hired after normal retirement age;
- that an employer may stop contributing to a defined contribution plan when an employee reaches normal retirement age;
- that a defined contribution plan may exclude anyone hired after normal retirement age;
- that a defined benefit plan may decline to credit -- for purposes of benefit accrual -- any services rendered after normal retirement age;

- that a defined benefit plan may decline to adjust actuarially the accrued benefit due an employee who continues to work beyond normal retirement age;
- that a defined benefit plan may decline to accrue benefits for an employee who continues to work beyond normal retirement age, and
- that a defined benefit plan may decline to take account of salary increases or benefit improvements which occur after normal retirement age.

These guidelines have become the basis for a complex network of pension and other employee benefit plans. Over 5,000 multi-employer plans crisscross the construction industry. A great number of unilateral plans are also in place. AGC believes that S.2617 will ultimately require the industry to restructure this entire network. The Equal Employment Opportunity Commission (EEOC) was given the responsibility for enforcement of the ADEA in July of 1979. S. 2617 could ultimately cause the EEOC to seek to radically revise the Labor Department's earlier guidelines. Notwithstanding the legislative history of the 1978 amendments, and the provisions of ERISA, the EEOC has already made one aborted attempt.

After assuming the responsibility for enforcement of the ADEA, the EEOC drafted its own guidelines on section 4(f)(2). The EEOC never formally proposed these revised guidelines, but did circulate the guidelines among a number of other federal agencies, including the Labor Department, the Internal Revenue Service, and the President's Commission on Pension Policy. Among other things, the EEOC's guidelines provided:

- that a defined benefit plan may not exclude anyone hired within 5 years of normal retirement age;

- that a defined benefit plan may not exclude anyone hired after normal retirement age;
- that an employer must continue contributing to a defined contribution plan even after an employee reaches normal retirement age -- unless the employee's account has already accumulated enough funds to provide a reasonable level of benefits;
- that a defined contribution plan may not exclude anyone -- even those hired after normal retirement age -- on the basis of age;
- that a defined benefit plan must credit services rendered after normal retirement age -- for purposes of benefit accrual -- unless the employee is already entitled to a full benefit;
- that a defined benefit plan must either adjust actuarially the benefits due an employee who continues to work after normal retirement age, or recalculate the employee's normal retirement benefit to take account of salary increases and benefit improvements which occur after normal retirement age; and
- that a defined benefit plan must continue to accrue benefits for an employee who continues to work beyond normal retirement age, unless the employee is already entitled to a full benefit.

The Labor Department strongly opposed the EEOC's revised guidelines, and even succeeded in checking the EEOC's push for revisions. However, the Labor Department could not prevent the EEOC from continuing to study the guidelines. In September of 1981, when it finalized a range of other guidelines on the ADEA, the EEOC explained that "[u]pon completion of its substantive review" of the Labor Department's guidelines, "the Commission will publish any proposed modifications . . . for notice and comment . . . ." 46 Fed. Reg. 47723, 47726 (1981). In short, the EEOC has kept its options open.

AGC fears that any further tampering with the age limitation of the ADEA may encourage the EEOC -- in the immediate or even the distant future -- to attempt another major revision of the Labor Department's guidelines. Legislative history is an inherently difficult course which often runs afoul in the courts. S.2617 would only make the footing more treacherous. The EEOC could interpret the legislative history of S.2617 to supersede, or at least dilute, the legislative history and intent of the similar amendments of 1978.

In this context, AGC should emphasize that the Labor Department's guidelines strike a delicate balance between ERISA and the ADEA. ERISA permits defined benefit plans to exclude anyone hired within five years of normal retirement age. The statute also permits defined benefit plans to stop crediting service or to halt accrual of benefits at normal retirement age. Related IRS regulations specifically provide that no actuarial adjustment to an accrued benefit shall be required on account of employment after normal retirement age. The EEOC's revised guidelines conflicted with all of these provisions.

Before proceeding any further, Congress should consider the underlying risk of disruption. Congress should at least amend ERISA to provide that it shall preempt the ADEA. The EEOC obviously lacks the expertise to strike an appropriate balance between the two statutes.

In any event, the argument for S.2617 remains less than compelling. S.2617 would not diminish the risk of future labor shortages. Senator John Heinz (R-PA) has related the bill to our standard of living:

"[T]he only way that we will be able to grow and proposper is if able bodied, productive older workers, who are today in their late forties or fifties or even early sixties, have the opportunity and incentive to continue working." 128 Cong. Rec. S.6623 (daily ed. June 10, 1982). Senator Lawton Chiles (D-FL) has expressed a need to "keep pace with the demographic situation that we face, in regard to our aging work force." Id., at S.6624. Senator Charles Percy (R-IL) has followed suit. Id., at 6625-26. The sponsors have argued, in short, that prohibiting employers from retiring their older workers will forestall future labor shortages.

AGC disagrees. If anything, the labor market will forestall future labor shortages. Older individuals will have the "opportunity and incentive to continue working" because employers will bid for their services. If the proponents of the bill are correct, employers will have no choice.

The proponents of S.2617 seem to have overlooked the fact that the ADEA, quite properly, does not require employers to retire their older employees. Such a requirement would constrict the labor market, and prevent it from functioning efficiently. The statute merely permits employers to retire their older employees.

Finally, S.2617 would foreclose serious consideration of all of the available options. The bill, and the debate which surrounds it, have cast the question of retirement in extremes. The bill requires a choice between all and nothing. AGC maintains that other options are available, and that Congress should thoroughly study them before making any decision. Congress should examine the merits of mandatory retirement, if not at age 70, then at some other age. Congress should also examine more creative alternatives. On further reflection, Congress may find that policies which not only permit but encourage employers to exercise flexibility will far better serve the interests and needs of older employees.

AGC thanks the Senate Labor Subcommittee for the opportunity to submit this statement of its views.

AMERICAN COUNCIL ON EDUCATION
Office of the President

September 14, 1982

The Honorable Donald L. Nickles
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

During our testimony of August 18 presented by Professor John Dunlop, we promised to share with you relevant research information concerning the issue of an exemption for tenured faculty and administrators in the proposed legislation to uncap mandatory retirement. In Professor Dunlop's oral statement before your Subcommittee, the issue of treatment of faculty in states with uncapping legislation was raised.

You will note from the enclosed document prepared by our colleagues at Princeton that five of the eight states which have either partially or fully uncapped their mandatory retirement have exempted tenured faculty. These five state statutory exemptions are comparable to the proposed language for a federal exemption, a copy of which is also enclosed. This pattern documents the agreement of our colleagues from many parts of the country with our position that the continuing strength of the tenure system requires the creation of an exemption for tenured faculty and administrators with faculty tenure.

Unfortunately, we were not granted time to testify before the House Subcommittee on Employment Opportunities when they held hearings on this issue. We will endeavor to make our position clear through a statement submitted for the record.

Should you have any questions concerning this research or our position on S. 2617, please do not hestitate to contact either of us.

Cordially,

Irving J. Spitzberg
General Secretary
American Association of
University Professors

J. W. Peltason
President
American Council on Education

Enclosures

One Dupont Circle, Washington, D.C. 20036-1193
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Provisions for Tenured Faculty in States with Partial or Full Uncapping of Retirement

Florida

FULL UNCAPPING
- Florida Human Rights Act of 1977
- Section 23.167

Maine

FULL UNCAPPING
- Maine Human Rights Act
- Subchapter 3
- Sections 4572, 4573

Utah

FULL UNCAPPING
- Utah Anti-Discriminatory Act
- Section 34-35-6

California

PARTIAL UNCAPPING
- California Fair Employment and Housing Act
- Chapter 6
- Article 1
- Section 12491

EXEMPTION FOR TENURED FACULTY
- California Fair Employment and Housing Act
- Chapter 6
- Article 1
- Section 12492

Connecticut

PARTIAL UNCAPPING
- Connecticut Human Rights and Opportunities Act
- Part II
- Section 46A-60

EXEMPTION FOR EMPLOYEES OF INSTITUTIONS OF HIGHER EDUCATION
- Connecticut Human Rights and Opportunities Act
- Part II
- Section 46A-60

New Hampshire

PARTIAL UNCAPPING
- New Hampshire Law Against Discrimination
- Section 354-A:8

EXEMPTION FOR NONPROFIT EDUCATIONAL CORPORATIONS
- New Hampshire Law Against Discrimination
- Section 354-A:3

Vermont

PARTIAL UNCAPPING
- Vermont Fair Employment Practices Act
- Section 495

EXEMPTION FOR TENURED FACULTY
- Vermont Fair Employment Practices Act
- Section 495g

Iowa

PARTIAL UNCAPPING FOR STATE EMPLOYEES WHO ARE MEMBERS OF THE IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
- Iowa Administrative Code
- Section 5.7(1), 5.7(3)

TENURED FACULTY AT IOWA STATE COLLEGES AND UNIVERSITIES ARE NOT MEMBERS OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Note: Tennessee retains the age seventy cap on retirement.

Joshua Pickus
Office of Governmental Affairs
Princeton University
August 25, 1982

Age Discrimination in Employment Act Amendments of 1982

Proposed Tenured Faculty Exemption and Study

Section 12 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631) is amended to add a new section as follows:

"(e) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).

"(f) The Secretary of Labor, in consultation with the Secretary of Education, is directed to undertake an appropriate study of the effect of the exemption contained in section 12(e) relating to tenured personnel in higher education. Such study shall be commenced not earlier than five years from the date of enactment of this act and shall be concluded not later than ten years from that date, at which time Congress shall determine whether the exemption shall be terminated.

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BURTON D. FRETZ
EXECUTIVE DIRECTOR

NEAL S. DUDOVITZ
DIRECTING ATTORNEY
LOS ANGELES

September 15, 1982

The Hon. Don Nickles
Chairman
Senate Subcommittee on Labor of the
Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Senator Nickles:

Thank you for your kind invitation to the National Senior Citizens Law Center to submit testimony before the Subcommittee with respect to S.2617, a bill to amend the Age Discrimination in Employment Act.

My absence from Washington during the week of the Subcommittee's hearings on S.2617 necessitate submission of the enclosed statement, with this request that it be included in the hearing record. The statement has been prepared by the Center as representatives of the National Gray Panthers.

Sincerely,

Burton D. Fretz
Burton D. Fretz

BDF:as
Encl:

Los Angeles Office: Suite 201, 1636 West 8th Street, Los Angeles, California 90017 • (213) 388-1381

WRITTEN STATEMENT

OF THE NATIONAL SENIOR CITIZENS LAW CENTER, INC.

ON BEHALF OF THE

NATIONAL GRAY PANTHERS

Before the

SUBCOMMITTEE ON LABOR OF THE
COMMITTEE ON LABOR AND HUMAN RESOURCES

OF THE UNITED STATES SENATE

ON S.2617

A BILL TO AMEND THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Submitted by

Burton D. Fretz
National Senior Citizens Law Center
1424 16th Street, N.W., Room 300
Washington, D.C. 20036
(202) 232-6570

September 15, 1982

Mr. Chairman and members of the Subcommittee:

This statement is submitted on behalf of the Gray Panthers with respect to S.2617, a bill to amend the Age Discrimination in Employment Act. The Gray Panthers is a non-profit organization incorporated in Pennsylvania with headquarters in Philadelphia. It has an approximate membership of 50,000 young and old persons who reside throughout the United States. Its members seek to advance the health, security and well-being of older persons in America and to strengthen existing programs for that purpose. It long has advocated, on behalf of its members and older persons generally, the elimination of practices which perpetuate age discrimination in our society.

Support is evident from Congress and the Administration to prohibit mandatory retirement and other forms of on-the-job age discrimination for persons over 70 years of age. Reasons for this are readily apparent: Yesterday's myths about productivity falling inversely with age have been shattered. Discrimination against any person which is unrelated to that person's ability to do a job is repugnant to our most basic values. Such discrimination is especially devastating under current economic conditions to people over 70 who need to work because of their pressing financial problems. Moreover, a law which can lead to higher employment of people over 70 will reduce demands on the Social Security fund, and will augment Social Security revenues through their own continued contributions to it.

There is widespread agreement, subject to exceptions noted below, that persons above the age of 70 should be protected from mandatory retirement. The real issue is whether the age 70 cap should also be lifted to prohibit discrimination in hiring and promotion, as S.2617 would do. We believe that it should.

The rationale for S.2617 is clear. If age discrimination against a person over 70 is wrong for someone who is currently employed but faces future loss of work, then it is just as wrong and much more harsh for a person already out of work.

Moreover, only one of every six complaints under the Act involves a failure to hire or promote. Thus, protection against such practice would constitute only a modest appendage to a general ban on mandatory retirement.

Opposition to complete elimination of the age 70 cap, rather than its substantial elimination, has not been articulated formally. Voiced informally is a fear that elimination of the age 70 cap would trigger complaints from persons over 70 who are denied hire or promotion and that these complaints would be time-consuming and expensive to resolve. However, these fears are not founded in fact.

First, the nation's small employers who supposedly would be burdened by this change would not be burdened in fact. Of all companies with fewer than 50 employees 93 percent have no mandatory retirement rules.

Second, massive numbers of frivolous charges of age discrimination by persons over 70 have not materialized in jurisdictions where persons over 70 already are protected from age discrimination. If the Subcommittee harbors any doubt about actual experience on this point it should check the record in those eight states which already prohibit age discrimination without regard to maximum age. For example, California contains a large elderly population and has prohibited age discrimination with no age limit since 1973. State officials report no complaints during this entire period from persons over 70 that they were not hired or promoted because of age.

Federal agencies since 1978 have been prohibited from discriminating on the basis of age against all persons, with no upper age limit. Yet virtually no burdensome or frivolous complaints of failure to hire were filed by persons over 70 with the Equal Employment Opportunity COmmission last year.

Third, permitting age discrimination in hiring and promotions against people over 70 will bar work to those elderly people who need it most. The objections of the business community rest on a fundamental misperception about the kind of persons who have the patience, aggressiveness, resources and legal sophistication to pursue a complaint of age discrimination through its administrative or judicial channels. People over the age of 70 who look for new work are not vexatious litigants but are people who simply cannot afford to retire.

Older people offer a chance to experiment in work styles. This includes useful arrangements such as job sharing and part-time work teams. Older people have special skills which can be extended to new employees, and in this way they provide an extra benefit to employers.

Apart from the above discussion, some voices from the corporate business community object to any change of the ADEA cap at age 70. One objection is that such a change will hamper management from predicting and filling vacancies which now arise under mandatory retirement plans. S.2617, however, in no way prevents management from inquiring about an employee's retirement plans in advance and tailoring its personnel policy accordingly. Also, the overwhelming number of employees plan to retire between the ages of 62 and 68, according to the Department of Labor 1981 Report to the Congress on the Age Discrimination in Employment Act.

Another objection is that employees will be inconvenienced in planning their own retirement if mandatory retirement plans are eliminated. While such concerns for employee welfare is commendable, we believe that employees would choose the flexibility in individual situations which S.2617 offers.

To deny any people the opportunity to compete fairly in the work place flies in the face of the work ethic and common sense. To allow a company to prevent persons over the age of 70 who are otherwise qualified from working because of an arbitrary policy based on custom, outdated stereotypes, or the convenience of a personnel office, remains unfair and unnecessary.

We thank the Subcommittee for allowing us the opportunity to submit these comments.

Senator **Nickles**. With that, the meeting is adjourned.

[Whereupon, at 12:52 p.m., the Subcommittee was adjourned.]

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